TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 29

THE UNITED STATES, PETITIONER

vs.

KOPPERS COMPANY, INC., SUCCESSOR ON MERGER TO KOPPERS UNITED COMPANY AND SUBSIDIARIES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MARCH 1, 1954

CERTIORARI GRANTED MAY 17, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 609

THE UNITED STATES, PETITIONER,

vs.

KOPPERS COMPANY, INC., SUCCESSOR ON MERGER TO KOPPERS UNITED COMPANY AND SUBSIDIARIES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

INDEX

1 In the United States Court of Claims

No. 78-52

KOPPERS COMPANY, INC., SUCCESSOR ON MERGER TO KOPPERS UNITED COMPANY AND SUBSIDIARIES, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT

PETITION—Filed February 18, 1952

To the Honorable, The Judges of the United States Court of Claims:

The petition of Koppers Company, Inc., Successor on Merger to Koppers United Company and Subsidiaries, a corporation organized and existing under the laws of the State of Delaware, with principal office in the Koppers Building, Pittsburgh, Pennsylvania, respectfully represents:

I

This is an action arising under the Internal Revenue Laws of the United States and is brought pursuant to Sections 322 and 3772 of the Internal Revenue Code (Title 26, USCA) and Section
2 1491 of the Judicial Code (Title 28, USCA). The plaintiff seeks to recover from the United States the sum of $273,-143.19, together with interest thereon as provided by law, which sum represents an overpayment of interest for the calendar years 1940 and 1941 on alleged deficiencies in excess profits taxes for those years.

II

(a) Koppers United Company was the parent company of a group of corporations which filed consolidated excess profits tax returns for the calendar years 1940 and 1941. The return on Form 1121 for 1940 was filed September 15, 1941, and an amended return on Form 1121 was filed July 21, 1944, with the Collector of Internal Revenue, Pittsburgh, Pennsylvania. The amended return for 1940 disclosed thereon excess profits net income of $3,653,890.77, an excess profits credit of $3,623,876.29 and an excess profits tax liability of $6,512.76. The tax for 1940 was paid to the Collector at Pittsburgh, $3,000.00 on March 15, 1941, $3,000.00 on June 13, 1941, and $512.76 on July 21, 1944, by Koppers United Company.

(b) The return on Form 1121 for 1941 was filed June 15, 1942, and an amended return on Form 1121 was filed June 20, 1942, with the Collector of Internal Revenue, Pittsburgh, Pennsylvania. The amended return for 1941 disclosed thereon excess profits net income of $6,545,206.33, an excess profits credit of $3,494,726.10 and an

excess profits tax liability of $1,781,288.14. The tax for 1941 was paid to the Collector at Pittsburgh quarterly during 1942 by Koppers United Company.

3

III

Koppers United Company, together with Koppers Company, The Koppers Erecting Corporation and Fuel Investment Associates, each of which companies were included in the consolidated excess profits tax returns of Koppers United Company and Subsidiaries for 1940 and 1941, were merged into Koppers Company, Inc., the plaintiff herein, by virtue of a Certificate of Agreement of Merger filed with the Recorder of Deeds for New Castle County, Delaware, on November 10, 1944.

IV

By timely filed consents, the plaintiff, as successor on merger to Koppers United Company, and the Commissioner of Internal Revenue mutually agreed that the amount of any income, excess profits or war profits tax due by Koppers United Company as parent of the consolidated group for 1940 and 1941 could be assessed at any time on or before June 30, 1951.

V

On September 15, 1943, Koppers United Company, as parent of the consolidated group, filed on Form 991 an application for relief under Section 722 of the Internal Revenue Code, claiming thereon a refund of $6,000.00 of the excess profits tax paid for 1940. On or about September 10, 1945, an amended application was filed, reducing the amount claimed as a refund for 1940 from $6,000.00 to $22.56. On September 15, 1943, Koppers United Company, as parent of the consolidated group, filed on Form 991 an application for relief under Section 722 of the Internal Revenue Code,

4 claiming thereon a refund of $1,781,288.14 of the excess profits tax paid for 1941. On or about November 20, 1945, an amended application was filed reducing the amount claimed as a refund for 1941 from $1,781,288.14 to $541,103.86.

VI

On December 16, 1950, the plaintiff, as successor on merger to Koppers United Company, executed an "Agreement to Amount of Constructive Average Base Period Net Income Determined Under Section 722, Internal Revenue Code" (Form EPC-1) for the taxable years 1940 and 1941. The amount of constructive average base period net income agreed to for the year 1940 was $2,801,598.22, and for the year 1941 was $3,394,944.93. These amounts were approved on January 10, 1951, by the Excess Profits Tax Council of the Bureau of Internal Revenue.

VII

At various times, the Internal Revenue Agent in Charge at Pittsburgh forwarded to the plaintiff copies of Revenue Agents' Reports covering examination of the amended consolidated excess profits tax return of Koppers United Company and Subsidiaries for 1940 in which there were proposed excess profits net incomes, excess profits credits and deficiencies in excess profits tax as follows:

Date of transmittal letter	Excess profits net income proposed 1940	Excess profits credit proposed 1940	Deficiency in excess profits tax proposed 1940
Sept. 23, 1946	$4,158,504.30	$2,612,509.89	$710,754.85
Mar. 1, 1949	3,543,895.44	2,256,809.26	594,385.50
Feb. 9, 1951	3,280,942.26	2,661,518.31	260,554.39

5 The letter dated February 9, 1951, reflected the agreement reached with respect to the amount of taxable net income for the year 1940 and the amount of relief allowable under Section 722, I.R.C., as determined by the Excess Profits Tax Council. The relief thus allowed increased the excess profits credit for 1940 to $2,661,518.31, resulting in a decrease in the deficiency in excess profits tax proposed to $260,554.39.

VIII

At various times, the Internal Revenue Agent in Charge at Pittsburgh forwarded to the plaintiff copies of Revenue Agents' Reports covering examination of the amended consolidated excess profits tax return of Koppers United Company and Subsidiaries for 1941 in which there were proposed excess profits net incomes, excess profits credits and deficiencies in excess profits tax as follows:

Date of transmittal letter	Excess profits net income proposed 1941	Excess profits credit proposed 1941	Deficiency in excess profits tax proposed 1941
Apr. 29, 1949	$6,102,978.68	$2,576,117.11	$272,078.42
Feb. 9, 1951	6,353,492.13	3,143,429.68	95,749.33

The letter dated February 9, 1951, reflected the agreement reached with respect to the amount of taxable net income for the year 1941 and the amount of relief allowable under Section 722, I.R.C., as determined by the Excess Profits Tax Council. The relief thus allowed increased the excess profits credit for 1941 to $3,143,429.68, resulting in a decrease in the deficiency in excess profits tax proposed to $95,749.33.

6 IX

On February 14, 1951, the plaintiff, as successor on merger to Koppers United Company, filed a "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment", agreeing to the proposed deficiency of $260,554.39 for 1940 and to the proposed deficiency of $95,749.33 for 1941. On

March 8, 1951, the Commissioner issued a formal notice by registered mail to Koppers United Company and Subsidiary Companies, c/o Koppers Company, Inc., in which he determined deficiencies in excess profits tax for these companies for 1940 and 1941 in the amounts of $260,554.39 and $95,749.33, respectively.

X

These deficiencies, together with interest of $217,376.07 for 1940 and $230,504.86 for 1941, were assessed against Koppers United Company and Subsidiaries, Koppers Company, Inc., successor on merger, on the April 17, 1951 special assessment list #4 for the 23rd District of Pennsylvania. The interest was computed on the basis of the excess profits tax which would have been due if the relief provided by Section 722 in computing the excess profits credit had not been allowed, as shown by the following comparison of the basis upon which the interest was computed and the basis upon which the deficiency in excess profits tax was determined and assessed by the Commissioner:

7

1940

	Basis for Computation of Interest Assessment	Basis for Computation of Deficiency as Determined by Commissioner on March 8, 1951
Excess Profits net income	$3,280,942.26	$3,280,942.26
Less: Specific exemption	$ 10,000.00	$ 5,000.00
Excess profits credit	$2,256,809.26	$2,661,518.31
Total	$2,266,809.26	$2,666,518.31
Remainder-Adjusted excess profits net income	$1,014,133.00	$ 614,423.95
Tax on $20,000.00 at 25%	$ 5,000.00	$ 5,000.00
Tax on $30,000.00 at 30%	9,000.00	9,000.00
Tax on $50,000.00 at 35%	17,500.00	17,500.00
Tax on $150,000.00 at 40%	60,000.00	60,000.00
Tax on $250,000.00 at 45%	112,500.00	112,500.00
Tax on $514,133.00 at 50%	257,066.50	.....
Tax on $114,423.95 at 50%	.....	57,211.98
Excess profits tax	$ 461,066.50	$ 261,211.98
Amount due to application of Section 734, I. R. C.	5,855.17	5,855.17
Excess Profits tax liability	$ 466,921.67	$ 267,067.15
Previous assessment	6,512.76	6,512.76
Additional Excess Profits Tax	$ 460,408.91	$ 260,554.39
Interest computed and assessed on this additional excess profits tax—6% on $460,408.91 from 3/15/41 to 1/28/49	$ 217,376.07	

8 1941

	Basis for Computation of Interest Assessment	Basis for Computation of Deficiency as Determined by Commissioner on March 8, 1951
Excess profits net income	$6,353,492.13	$6,353,492.13
Less: Specific exemption	$ 5,000.00	$ 5,000.00
Excess profits credit	2,576,117.11	3,143,429.68
Total	$2,581,117.11	$3,148,429.68
Remainder—Adjusted excess profits net income	$3,772,375.02	$3,205,062.45
Tax on $20,000 at 35%	$ 7,000.00	$ 7,000.00
Tax on $30,000 at 40%	12,000.00	12,000.00
Tax on $50,000 at 45%	22,500.00	22,500.00
Tax on $150,000 at 50%	75,000.00	75,000.00
Tax on $250,000 at 55%	137,500.00	137,500.00
Tax on $3,272,375.02 at 60%	1,963,425.01	.....
Tax on $2,705,062.45 at 60%	.....	1,623,037.47
Excess profits tax	$2,217,425.01	$1,877,037.47
Less—Credit for foreign taxes	9,405.92	.....
Excess profits tax liability	$2,208,019.09	$1,877,037.47
Previous assessment	$1,781,288.14	$1,781,288.14
Additional excess profits tax	$ 426,730.95	$ 95,749.33
Interest computed and assessed on this additional excess profits tax—6% on $426,730.95 from 3/15/42 to 3/16/51	$ 230,504.86	

XI

On April 19, 1951, the Collector at Pittsburgh sent to the plaintiff, successor on merger to Koppers United Company, a notice on Treasury Department Form 7658 entitled "Statement of Income Tax Due". The statement demanded payment of excess profits tax of $260,554.39 for 1940, which was offset on the statement by a credit of the same amount opposite a notation "1/28/49 rec'd".

9 The statement also demanded the payment of interest for 1940 of $217,376.07.

XII

The plaintiff paid the interest of $217,376.07, so assessed, to the Collector at Pittsburgh on April 24, 1951.

XIII

Also on April 19, 1951, the Collector at Pittsburgh sent to the plaintiff, successor on merger to Koppers United Company, a notice on Treasury Department Form 7658 entitled "Statement of Income Tax Due". This statement demanded payment of excess profits

tax of $95,749.33 for 1941 and interest of $230,504.86. The plaintiff used certain overassessments of $83,277.55, the source of which is not material here, as a credit against the deficiency in excess profits tax for 1941 of $95,749.33, leaving a balance due of $12,471.78.

XIV

The plaintiff paid the balance of the 1941 excess profits tax of $12,471.78, together with interest of $230,504.86, to the Collector at Pittsburgh on April 24, 1951.

XV

On June 29, 1951, the plaintiff filed with said Collector claims for refund on Form 843 for interest on excess profits tax for the calendar year 1940 in the amount of $94,358.71 and for the calendar year 1941 in the amount of $178,784.48, or such greater amounts as are legally refundable. These claims were based on Section 292(a) of the Internal Revenue Code (Title 26, USCA) which provides for the assessment and collection of "Interest upon the amount determined as a deficiency * * *." The amounts here determined and assessed as deficiencies in excess profits tax for 1940 and 1941 were $260,554.39 and $95,749.33 respectively. Interest to the extent of $123,017.36 was properly assessed on the deficiency for 1940 (6% on $260,554.39 from 3/15/41 to 1/28/49), and interest to the extent of $51,720.38 was properly assessed on the deficiency for 1941 (6% on $95,749.33 from 3/15/42 to 3/16/51). The remaining interest, $94,358.71 for 1940 and $178,784.48 for 1941, was computed on alleged deficiencies which were never determined or assessed, and said interest in the total amount of $273,143.19 therefore was erroneously and illegally collected by the Collector. (*Henry River Mills Company* v. *The United States*, 119 Ct. Cls. —, (April 3, 1951 96 F. Supp. 477, 51-1 U.S.T.C. 9225.)

XVI

On December 13, 1951, the Commissioner of Internal Revenue sent the plaintiff by registered mail a statutory notice of the disallowance of said claims for refund.

XVII

By reason of the foregoing the defendant has illegally and erroneously refused to refund to the plaintiff the said amount of $273,143.19 together with interest as provided by law.

XVIII

The plaintiff is the owner of this claim and there has been no assignment or transfer of it or any part thereof.

11-12 XIX

WHEREFORE, the plaintiff prays for a judgment against the United States of America on the facts and the law for the sum of $273,-143.19, with interest thereon as provided by law; for its reasonable costs and disbursements herein; and for such other and further relief in the premises as may be just.

DAVID W. RICHMOND,
920 Southern Building,
Washington 5, D. C.,
Attorney for Plaintiff.

Of Counsel:

FREDERICK O. GRAVES,
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E. S. RUFFIN, JR.,
C. M. CRICK,
Koppers Building,
Pittsburgh, Pennsylvania.

13 In the United States Court of Claims

[Title omitted]

ANSWER—Filed October 1, 1952

The defendant herein, the United States of America, by and through its Acting Assistant Attorney General, answers plaintiff's petition as follows:

I. Admits the allegations in paragraph I, except to deny that the sum therein stated represents an overpayment of interest on alleged deficiencies in excess profits taxes for the calendar years 1940 and 1941.

II. Admits the allegations in paragraphs II through XVI, excepting only the allegations in the last sentence beginning on
14 line 10 and ending on line 15 of paragraph XV, reading:

> The remaining interest, $94,358.71 for 1940 and $178,784.48 for 1941, was computed on alleged deficiencies which were never determined or assessed, and said interest in the total amount of $273,143.19 therefore was erroneously and illegally collected by the Collector.

It is admitted that the deficiencies never were assessed, but the remaining allegations in the quoted excerpt are specifically denied for

the reason that, at the time the overassessments of excess profits tax for the years 1940 and 1941 were determined, the Commissioner of Internal Revenue also determined that, immediately prior to an allowance of relief under Section 722 of the Internal Revenue Code, the taxpayer was liable for additional excess profits taxes for 1940 and 1941 and for interest thereon.

III. Denies the allegations in paragraph XVII.

IV. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph XVIII.

As an additional defense in the nature of a set-off, defendant alleges that the Commissioner of Internal Revenue for the years 1940 and 1941, as to which consolidated excess profits tax returns were filed, determined and paid to other corporations in the consoli-
15-16 dated group interest aggregating $2,926.85, and, if plaintiff is entitled to recover the amount of $273,143.19 claimed in its petition, then that amount should be reduced by the sum of $2,926.85 and judgment entered for the difference.

WHEREFORE, defendant prays that plaintiff take nothing from it in this suit, and that the same be dismissed with costs against the plaintiff.

CHARLES S. LYON,
Acting Assistant Attorney General.

JOHN A. REES,
Attorney.

17 In the United States Court of Claims

[Title omitted]

FIRST AMENDED ANSWER—Filed October 17, 1952

The defendant herein, the United States of America, by and through its Assistant Attorney General, amends the answer which it filed on October 1, 1952, by deleting that portion of paragraph II on page 14, consisting of 11 lines, following the indented excerpt from paragraph XV of plaintiff's petition, and in lieu thereof inserts the following:

These allegations are denied and in this connection it is alleged that facts set forth in paragraphs IX and X of the petition and already admitted in this answer show that interest of $217,376.07 for 1940 and $230,504.86 for 1941 was computed and assessed
18 on additional excess profits tax of $460,408.91 for 1940 and $426,730.95 for 1941, and also show that of these additional taxes portions only—$260,554.39 for 1940 and $95,749.33 for 1941—were assessed as deficiencies. The defendant also alleges that deficiencies were determined of $460,408.91 for 1940 and of $426,730.95

for 1941; that the portions thereof which were not assessed were extinguished by the allowance of excess profits credits which resulted from the relief allowed by the Excess Profits Tax Council—as alleged in paragraphs VII and VIII of the petition and admitted in this answer—; that interest of $217,376.07 on the determined deficiency of $460,408.91 was assessed for the period beginning March 15, 1941, which was the due date of the 1940 return, to January 28, 1949, which was the date the sum of $260,554.39 was paid; and that interest of $230,504.86 on the determined deficiency of $426,730.95 was assessed for the period beginning March 15, 1942, which was the due date of the 1941 return, to March 16, 1951, which was 30 days after the plaintiff filed a certain waiver as alleged in paragraph IX of the petition.

CHARLES S. LYON,
Assistant Attorney General.

JOHN A. REES,
Attorney.

19-20 PROCEEDINGS FOLLOWING FILING OF DEFENDANT'S ANSWERS

On October 20, 1952, plaintiff filed a motion for judgment on the pleadings.

On November 19, 1952, defendant filed a response to plaintiff's motion for judgment on the pleadings.

On January 9, 1953 defendant filed a motion for a summary judgment.

On January 12, 1953, plaintiff's motion for judgment on the pleadings and defendant's motion for summary judgment were withdrawn in open court and the case remanded to Commissioner Akers for further proceedings.

21 In the United States Court of Claims

[Title omitted]

REPORT OF COMMISSIONER—Filed February 4, 1953

To the honorable the Chief Judge and Associate Judges of the United States Court of Claims:

Pursuant to the order of reference in the above-entitled case, the following determination and report of the facts is submitted:

1. (a) Koppers United Company was the parent company of a group of corporations which filed consolidated excess profits tax returns for the calendar years 1940 and 1941. The return on Form 1121 for 1940 was filed September 15, 1941, and an amended return on Form 1121 was filed July 21, 1944, with the Collector of Internal

Revenue, Pittsburgh, Pennsylvania. The return for 1940 disclosed thereon excess profits net income of $3,656,110.35, an excess profits credit of $3,804,935.25, and showed no tax due. The amended return for 1940 disclosed thereon excess profits net income of $3,653,890.77, an excess profits credit of $3,623,876.29, an adjusted excess profits net income of $25,014.48, and an excess profits tax liability of $6,512.76. The tax for 1940 was paid to the Collector at Pittsburgh, $3,000 on March 15, 1941, $3,000 on June 13, 1941, and $512.76 on July 21, 1944, by Koppers United Company.

(b) The return on Form 1121 for 1941 was filed June 15, 1942, and an amended return on Form 1121 was filed June 20, 1942, with the Collector of Internal Revenue, Pittsburgh, Pennsylvania. The return for 1941 disclosed thereon excess profits net income of $6,613,646.26, an excess profits credit of $3,494,726.10, an adjusted excess profits net income of $3,113,920.16, and an excess profits tax liability of $1,822,352.10. The amended return for 1941 disclosed thereon excess profits net income of $6,545,206.33, an excess profits credit of $3,494,726.10, an adjusted excess profits net income of $3,045,480.23, and an excess profits tax liability of $1,781,288.14. The tax for 1941 was paid to the Collector at Pittsburgh quarterly during 1942 by Koppers United Company.

22

(c) The returns mentioned in the two paragraphs next above were made and the tax reported thereon was computed without the application of Section 722 of the Internal Revenue Code.

2. Koppers United Company, together with Koppers Company, The Koppers Erecting Corporation and Fuel Investment Associates, each of which companies was included in the consolidated excess profits tax returns of Koppers United Company and Subsidiaries for 1940 and 1941, were merged into Koppers Company, Inc., the plaintiff herein, by virtue of a Certificate of Agreement of Merger filed with the Recorder of Deeds for New Castle County, Delaware, on November 10, 1944.

3. By timely filed consents, the plaintiff, as successor on merger to Koppers United Company, and the Commissioner of Internal Revenue mutually agreed that the amount of any income, excess profits, or war profits tax due by Koppers United Company as parent of the consolidated group for 1940 and 1941 could be assessed at any time on or before June 30, 1951.

4. On September 15, 1943, Koppers United Company, as parent of the consolidated group, filed on Form 991 an application for relief under Section 722 of the Internal Revenue Code, claiming thereon a refund of $6,000 of the excess profits tax paid for 1940. On September 10, 1945, an amended application was filed, reducing the amount claimed as a refund for 1940 from $6,000 to $22.56. On September 15, 1943, Koppers United Company, as parent of the

consolidated group, filed on Form 991 an application for relief under Section 722 of the Internal Revenue Code, claiming thereon
23 a refund of $1,781,288.14 of the excess profits tax paid for 1941. On November 20, 1945, an amended application was filed reducing the amount claimed as a refund for 1941 from $1,781,288.14 to $541,103.86.

5. On December 16, 1950, the plaintiff, as successor on merger to Koppers United Company, executed an "Agreement to Amount of Constructive Average Base Period Net Income Determined Under Section 722, Internal Revenue Code" (Form EPC-1) for the taxable years 1940 and 1941. The amount of constructive average base period net income agreed to for the year 1940 was $2,801,598.22, and for the year 1941 was $3,394,944.93. These amounts were approved on January 10, 1951, by the Excess Profits Tax Council of the Bureau of Internal Revenue.

6. At various times, the Internal Revenue Agent in Charge at Pittsburgh forwarded to the plaintiff copies of revenue agents' reports covering examination of the amended consolidated excess profits tax return of Koppers United Company and Subsidiaries for 1940 in which he proposed excess profits net income, excess profits credits and deficiencies in excess profits tax as follows:

Date of transmittal letter	Proposed excess profits net income 1940	Proposed excess profits credit 1940	Proposed deficiency in excess profits tax—1940
Sept. 23, 1946	$4,158,504.30	$2,612,509.89	$740,753.85
Mar. 1, 1949	3,543,895.44	2,256,809.26	594,385.50
Feb. 9, 1951	3,280,942.26	2,661,518.31	260,554.39

The letter dated February 9, 1951, reflected the agreement reached with respect to the amount of taxable net income for the year 1940 and the amount of relief allowable under Section 722, Internal Revenue Code, as determined by the Excess Profits Tax Council. The relief thus allowed increased the excess profits credit for 1940 to $2,661,518.31, resulting in a decrease in the proposed deficiency in excess profits tax to $260,554.39.

7. At various times, the Internal Revenue Agent in Charge at Pittsburgh forwarded to the plaintiff copies of revenue agents' reports covering examination of the amended consolidated excess profits tax return of Koppers United Company and Subsid-
24 iaries for 1941 in which he proposed excess profits net incomes, excess profits credits and deficiencies in excess profits tax as follows:

Date of transmittal letter	Proposed excess profits net income 1941	Proposed excess profits credit 1941	Proposed deficiency in excess profits tax—1941
Apr. 29, 1949	$6,102,978.68	$2,576,117.11	$272,078.42
Feb. 9, 1951	6,353,492.13	3,143,429.68	95,749.33

The letter dated February 9, 1951 reflected the agreement reached with respect to the amount of taxable net income for the year 1941 and the amount of relief allowable under Section 722, Internal Revenue Code, as determined by the Excess Profits Tax Council. The relief thus allowed increased the excess profits credit for 1941 to $3,143,429.68, resulting in a decrease in the proposed deficiency in excess profits tax to $95,749.33.

8. Thereafter and on February 14, 1951, the plaintiff executed and filed with the Internal Revenue Agent in Charge at Pittsburgh, Pennsylvania, a waiver on Treasury Form 874 consenting to the assessment and collection of deficiencies in tax on returns filed for several taxable periods including the calendar years 1940 and 1941 in the respective amounts of $260,554.39 and $95,749.33.

9. In computing the proposed deficiencies set out in the preceding findings, the Commissioner, in accordance with the administrative practice of the Internal Revenue Bureau, first computed the excess profits tax liability for each of the years 1940 and 1941 without the allowance of any relief provided by Section 722. At that time, February 26 and February 27, 1951, an agreement had been reached between the parties, as shown in findings 6 and 7, both as to the amount of taxable net income and the amount of relief allowable under Section 722. Those computations showed the following results:

	1940	1941
Excess profits net income	$3,280,942.26	$6,353,492.13
Excess profits credit	2,261,809.26	2,576,117.11
Adjusted excess profits net income	1,014,133.00	3,772,375.02
Excess profits tax before application of Section 722	466,921.67	2,208,019.09
Excess profits tax shown on return and paid	6,512.76	1,781,288.14
Excess profits tax before application of Section 722 but after allowing credit for payments made with return	460,408.91	426,730.95

25 10. After the computations referred to in the preceding findings had been made, the Commissioner gave effect to the relief allowable under Section 722 which reduced the excess profits tax liability for 1940 from $466,921.67 to $267,067.15, that is, in the amount of $199,854.52, and for 1941 from $2,208,019.09 to $1,877,037.47, that is, in the amount of $330,981.62. Against the amounts so reduced he gave credit for the excess profits tax reported and paid in the same manner as in the previous computations, that is, $6,512.76 for 1940 and $1,781,288.14 for 1941. After the allowance of these credits there was shown a balance of excess profits tax due for 1940 of $260,554.39 and for 1941 of $95,749.33. On March 8, 1951, the Commissioner issued his statutory notice of a determination of deficiencies in the amounts just stated, such notice reading in part as follows:

> You are advised that the determination of your excess profits tax liability for the years ended December 31, 1940, 1941, * * * discloses deficiencies of $260,554.39, $95,749.33, * * * respectively.

No similar notice was given by the Commissioner with respect to the results of his computation of the excess profits tax liability before the application of Section 722.

11. The Bureau of Internal Revenue computed interest for the years 1940 and 1941 as follows: for the year 1940, interest in the sum of $217,376.07 was computed upon $460,408.91 for the period beginning March 15, 1941 (which was the due date of the 1940 return), to January 28, 1949 (which was treated as the date of payment of the deficiency of $260,554.39); and for the year 1941, interest in the sum of $230,504.86 was computed upon $426,730.95 for the period beginning March 15, 1942 (which was the due date of the 1941 return), to March 16, 1951 (which was thirty days after the waiver referred to in finding 8 was filed).

12. On April 17, 1951, pursuant to the waiver filed February 14, 1951, the Commissioner assessed deficiencies in excess profits tax of $260,554.39 for 1940 and $95,749.33 for 1941 and at the same time assessed interest of $217,376.07 for 1940 and $230,504.86 for 1941. These amounts of tax and interest were paid in full by the plaintiff to the Collector at Pittsburgh. The payments of interest were made on April 24, 1951, upon notice and demand.

26 13. On June 29, 1951, the plaintiff timely filed a formal claim for refund of part of the interest which had been assessed and paid for the years 1940 and 1941, as stated above. It claimed refunds of $94,358.71 for 1940 and $178,784.48 for 1941, or such greater amounts as legally might be due. Each claim for refund set forth as a ground that the claimed interest was erroneously and illegally collected upon an amount not determined as a deficiency in accordance with Section 292 (a) of the Internal Revenue Code. Each claim said in part:

> The interest was computed on the basis of the excess profits tax which would have been due if the relief provided by Section 722 in computing the excess profits credit had not been allowed.

The plaintiff concedes that the remaining interest to the extent of $123,017.36 was properly assessed on the deficiency for 1940 (six percent on $260,554.39 from 3/15/41 to 1/28/49) and that the remaining interest to the extent of $51,720.38 was properly assessed on the deficiency for 1941 (six percent on $95,749.33 from 3/15/42 to 3/16/51).

14. On December 13, 1951, the Commissioner sent to the plaintiff by registered mail a statutory notice of disallowance of each of its claims for refund.

15. The plaintiff concedes that the set-off in the amount of $2,926.85, alleged by the defendant in paragraph IV of its Answer, is a proper set-off, and that if it is entitled to recover the amount of $273,143.19 claimed in its petition, then that amount should be reduced by the sum of $2,926.85 and judgment entered for the difference.

Respectfully submitted.

RICHARD H. AKERS,
Commissioner.

27-28 ARGUMENT AND SUBMISSION OF CASE

On May 7, 1953, the case was argued and submitted on the merits by Mr. David W. Richmond for the plaintiff and by Mrs. Elizabeth B. Davis and Mr. John E. Garvey for the defendant.

29 In the United States Court of Claims

No. 78-52

KOPPERS COMPANY, INC., SUCCESSOR ON MERGER TO KOPPERS UNITED COMPANY AND SUBSIDIARIES,

v.

THE UNITED STATES

Opinion of the Court by Littleton, Judge, Findings of Fact and Conclusion of Law—December 1, 1953

Mr. David W. Richmond for the plaintiff. Messrs. Frederick O. Graves, Miller & Chevalier, E. S. Ruffin, Jr., and C. M. Crick, were on the brief.

Mrs. Elizabeth B. Davis and Mr. John E. Garvey, with whom was Mr. Assistant Attorney General H. Brian Holland, for the defendant. Messrs. Andrew D. Sharpe and Ellis N. Slack were on the brief.

LITTLETON, Judge, delivered the opinion of the court:

Plaintiff sues to recover $273,143.19, plus interest, claiming that such amount represents an illegal collection and overpayment of interest on "potential" excess profits tax deficiencies of $199,854.52 and $330,981.62 for the years 1940 and 1941, respectively. These "potential" deficiencies, which under the law and the facts of plaintiff's case for the years involved, the plaintiff was never required to pay, and which, at the time they were computed could not be legally collected, represents the amounts of excess profits tax which plain-

tiff would have been required to pay had it not been entitled under the facts and the law to have its excess profits tax for the years mentioned determined, computed and assessed under and in accordance with the provisions of Section 722 of the Internal Revenue Code (26 U. S. C. 722; 54 Stat. 986, as amended. Repealed November 8, 1945, 59 Stat. 568).

The issue presented is whether the assessment and collection of interest on such "potential" deficiencies was proper under a proper interpretation of the taxing statutes as applied to the facts of this case. These facts are not in dispute and are summarized below.

Plaintiff [1] filed excess profits tax returns for the calendar years 1940 and 1941 on the dates and reflecting the computations set out in the tabulation below:

	Excess profits net income	Excess profits credit	Adjusted excess profits net income	Excess profits tax liability
1940 return filed 9-15-41.	$3,656,110.35	$3,864,935.25	.....	.....
Amended 1940 return, filed 7-21-44.....	3,653,890.77	3,623,876.29	$25,014.48	$6,512.76
1941 return filed 6-15-42.	6,613,646.26	3,494,726.10	3,113,920.16	1,822,352.10
Amended return 1941, filed 6-20-42.....	6,545,206.33	3,494,726.10	3,045,480.23	1,781,288.14

The tax for 1940 was paid in installments of $3,000 on March 15, 1941; $3,000 June 13, 1941, and $512.75 July 21, 1944. The tax for 1941 was paid quarterly during 1942.

On September 15, 1943, plaintiff filed, pursuant to law, applications for determination and assessment of its profits tax under the provisions of the Internal Revenue Code, claiming, at the same time, refunds of $6,000 of the excess profits tax paid for 1940, and $1,781,288.14 of such tax paid for 1941. The claim for 1940 was reduced to $22.56 by an amended application filed September 10, 1945, and the 1941 claim was lowered to $541,103.86 by an amended application of November 20, 1945. By timely consents filed, the plaintiff and the Commissioner of Internal Revenue mutually agreed that the amount of any income, excess profits, or war profits tax due by Koppers United Company, as parent of the consolidated group, for 1940 and 1941, might be assessed at any time on or before June 30, 1951.

The differences between the plaintiff and the Commissioner of

[1] Koppers Company, Inc., is successor by merger of Koppers United Company and its subsidiaries, which filed consolidated excess profits tax returns for 1940 and 1941. Although the merger did not occur until November 10, 1944 (finding 2), as a matter of convenience we shall refer to the taxpayer as "plaintiff" without regard to the corporate structure at any particular time.

Internal Revenue with respect to their respective claims were not reconciled until December 16, 1950, on which date plaintiff executed an "Agreement to Amount of Constructive Average Base Pe-
31 riod Net Income Determined Under Section 722, Internal Revenue Code" (Form EPC-1), in which the constructive average base period net income for 1940 and 1941 was set out as $2,801,598.22 and $3,394,944.93, respectively. These amounts so determined and agreed to were approved by the Excess Profits Tax Council, Bureau of Internal Revenue, on January 10, 1951.

At various times the Internal Revenue Agent in Charge at Pittsburgh, Pennsylvania, forwarded to plaintiff copies of reports concerning examination of plaintiff's excess profits tax returns in which were proposed excess profits net income, excess profits credits and deficiencies in excess profits tax for 1940 and 1941, as follows:

1940

Date of transmittal letter	Proposed excess profits net income	Proposed excess profits credit	Proposed deficiency in excess profits tax
Sept. 23, 1946	$4,158,504.30	$2,612,569.89	$710,753.85
Mar. 1, 1949	3,543,895.44	2,256,809.26	594,385.50
Feb. 9, 1951	3,280,942.26	2,661,518.31	260,554.39

1941

Date of transmittal letter	Proposed excess profits net income	Proposed excess profits credit	Proposed excess profits tax deficiency
Apr. 29, 1949	$6,102,978.68	$2,576,117.11	$272,078.42
Feb. 9, 1951	6,353,492.13	3,143,429.68	95,749.33

The letters of February 9, 1951, reflected the agreement reached with respect to the determination, computation and assessment of the tax under Section 722, *supra*, as determined by the Excess Profits Tax Council.

Plaintiff executed and filed a waiver (Form TF 874) on February 14, 1951, consenting *inter alia* to the assessment and collection of deficiencies in its excess profits tax for 1940 and 1941, in the respective amounts of $260,554.39 and $95,749.33. In determining these deficiencies, the Commissioner first *computed* the excess profits tax for each of the years without regard to Section 722. However, at that time (February 26 and 27, 1951) a written agreement had been executed by the parties, both as to the amount of taxable
32 net income and the amount of tax liability under Section 722.

The results of the Commissioner's computations are reflected below:

	1940	1941
Excess profits tax net income	$3,280,942.26	$6,353,492.13
Excess profits credit	2,261,809.26	2,576,117.11
Adjusted excess profits net income	1,014,133.00	3,772,375.02
Excess profits tax before application of §722	466,921.67	2,208,019.09
Excess profits tax shown on return and paid	6,512.76	1,781,288.14
Excess profits tax before determination under §722, but after allowing credits for pay-	460,408.91	426,730.95

After the above calculations had been made, the Commissioner gave effect to the determination of the tax under Section 722 ($199,-854.52 for 1940 and $330,981.61 for 1941), which made the excess profits tax liability determined and collectible those amounts rather than the *computed* but uncollectible amounts of $460,408.91 and $426,730.95. On March 8, 1951, the Commissioner issued his statutory notice of deficiencies, which read in part, as follows:

> You are advised that the determination of your excess profits tax liability for the years ended December 31, 1940, 1941, * * * discloses deficiencies of $260,554.39, $95,749.33 * * * respectively.

No such notice was given by the Commissioner with respect to his computation of the excess profits tax other than the above quoted deficiency notice under Section 722. However, when the Bureau of Internal Revenue came to the computation of interest, such interest was computed on an excess profits tax *computed* by the Bureau without regard to the facts of plaintiff's case and the provisions of Section 722. This resulted in interest amounts of $217,376.07 for 1940 on $460,408.91, from March 15, 1941, to January 28, 1949 (this date was treated as the date of payment of the determined deficiency of $260,554.39), and of $230,504.86 for 1941 on $426,-730.95, from March 15, 1942, to March 16, 1951 (the last mentioned date being thirty days after the waiver of February 14, 1951, was filed).

When the Commissioner, pursuant to the waiver of February 14, 1951, assessed deficiencies in excess profits taxes of $260,554.39 for 1940 and $95,749.33 for 1941, on April 17, 1951, interest in the
33 amounts indicated above was also assessed. These amounts were paid by plaintiff under protest.

It is plaintiff's position that its liability for interest extends only to such interest as results from computations on the amounts of the deficiencies actually determined and assessed ($260,554.39 for 1940 and $95,749.33 for 1941) rather than that resulting from computations based on the entire amounts of the potential deficiencies, that is, $460,408.91 for 1940 and $426,730.95 for 1941, which it would have had to pay but for the applicability of Section 722. Claims for refunds of the difference between interest on the actual deficiencies assessed and the potential deficiencies were timely filed with the Bureau and formally denied. The amounts claimed were $94,-358.71 for 1940 and $178,784.48 for 1941. It is for recovery of the sum of these amounts ($273,143.19) that plaintiff now sues.

The determination of the propriety of the Commissioner's action in assessing interest on the potential deficiencies, described above, calls for the construction of Sections 292 (a) and 271 of the Internal Revenue Code, as well as some consideration of the nature and role

of Section 722 in the excess profits tax scheme. The quotation of the pertinent language of Sections 292 (a) and 271 may be helpful in presenting the issues involved since they represent the statutory authority for the assessment of interest on taxes.

§ 292 (a) INTEREST ON DEFICIENCIES

(a) GENERAL RULE. Interest upon the amount *determined* as a *deficiency* shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of six per centum per annum * * *. [Italics supplied.]

§ 271 DEFINITION OF DEFICIENCY

(a) IN GENERAL. As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which the tax imposed by this chapter exceeds * * * the amount shown as the tax by the taxpayer upon his return * * *.

The defendant contends that a "deficiency," as that term is used in the above provisions, existed in the amount on which interest was collected from the date of the return, and that while the application of Section 722 and the determination of the tax thereunder, "extinguished" part of this amount it did not "extinguish" the interest thereon. In this connection it is urged that insofar as interest is concerned, no distinction should be made between a net operating loss carry-back situation and the application of Section 722.

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For the reasons which follow, we do not agree.

The excess profits tax, as imposed by the Revenue Act of 1940 as amended,[2] was in essence a tax on those corporate earnings which exceeded the profits realized under normal economic conditions, not stimulated by war or defense spending. To determine what profits were to be subjected to the tax, rather complex formulae were provided by which the so-called "normal" profits were calculated and denominated the "excess profits credit." The difference between the "excess profits credit" and the earnings for a particular year was the amount subjected to the tax. One of the factors employed in calculating the excess profits credit was the average of the annual profits realized during a group of representative years (1936-1939) called the "base period." The result was termed "average base period net income."[3]

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[2] 54 Stat. 975, 26 U. S. C. §§ 710-752; 26 U. S. C. (Supp. IV), §§ 710-783. Repealed Nov. 8, 1945, 59 Stat. 568.

[3] We are aware that other elements were included in the determination of average base period net income and that the "normal

It is unnecessary to go into the many ramifications of excess profits tax computations to realize that if, for any of numerous possible reasons this average base period net income did not in fact reflect the earning norm of a corporation, the entire scheme of computation would be frustrated and gross inequities in the administration of the tax would result. It was in recognition of this possibility, or indeed this fact, that Section 722 was added to the Internal Revenue Code. This section provides in part as follows:

> In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be *determined* by using such constructive average base period net income *in lieu* of the average base period net income otherwise determined under this subchapter. * * * [Italics supplied.]

It should be immediately emphasized here that given the fact situation contemplated by this section and compliance by the taxpayer with the procedural necessities of application to the Commissioner, as required by the statute, and proof that excess profits tax (exclusive of Section 722) is excessive or discriminatory and establishes what would be a fair and just amount representing normal earnings, the constructive average base period net income was to be used *in lieu of* the average base period net income to *determine the tax*, rather than to merely *offset* the result of computations based on the latter.

The defendant would make no such distinction. Its argument is, in effect, that while the "*constructive* average base period net income" should be employed to determine the amount of the tax, the "average base period net income" must be the basis of interest computations, although such computation is on an amount which the statute itself calls "excessive" and "discriminatory."

We see no justification for such a construction. A review of the history and purpose of Section 722 convinces us that it is merely a refinement of the basic policy embodied in the excess

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profit" is not entirely synonymous with "excess profit credit," but for illustrative purposes this statement is substantially correct. This treatment of the excess profits tax scheme is admittedly an oversimplification, and it is indulged in only by way of placing the purpose of Section 722 into proper perspective.

profits tax scheme and not a departure from it.[4] It affords an alternative formula for determining the amount to be exacted when the economic facts of a particular corporation will
36 not fit properly into the "average base period net income" mechanism. The result sought is a fair and equitable tax *in lieu of*, not *in mitigation of*, an excessive and discriminatory one. It follows therefore that where the factual and procedural requirements of Section 722 have been met, the Commissioner must take cognizance of that section in "determining" a "deficiency," as those terms are used in Sections 292(a) and 271. In so doing the constructive average base period net income must of necessity be used in arriving at the basis on which interest is computed as for the determination and assessment of the tax itself. Once Section 722 is, on the facts established, brought to bear on an appropriate situation it is an integral part of the applicable tax law and cannot be employed eclectically by the Commissioner of Internal Revenue.[5] The result in the factual situation of the instant case is that there were no deficiencies for 1940 and 1941, within the meaning of the interest provisions of Section 292, on which interest could properly be determined and assessed, other than the deficiencies to which plaintiff consented, which the Commissioner, on the applicable facts and the law determined and assessed, and which the taxpayer paid for 1940 and 1941. This was our decision in *Henry*

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[4] In a study of the development of legislation dealing with excess profits taxation, one writer has made the following comment on "Relief" provisons which is especially applicable to Section 722: "The term 'relief,' however, is probably a misnomer. The provisions in question are more properly to be called refinements of either the income or credit computations. They are not acts of grace operating in defiance of the excess profits concept, but perfecting amendments in furtherance of basic policy." *Peterson*, "The Statutory Evolution of the Excess Profits Tax," 10 *Law and Contemporary Problems 3* (1943-44). Likewise, the Committee Reports dealing with Section 722 support the position that this section's purpose was the equitable application of the same basic tax to variant economic situations. *See:* H. Rept. No. 146, S. Rept. No. 75, on H. R. 3531 [Excess Profits Tax Amendments 1941], 77th Cong. 1st Sess.; H. Rept. No. 2333, S. Rept. No. 1631 [Revenue Bill of 1942], 77th Cong. 2d Sess.

[5] Defendant cites in this connection *American Coast Lines, Inc.* v. *Commissioner*, 159 Fed. (2) 665, and *Pohatcong Hosiery Mills* v. *Commissioner*, 162 Fed. (2d) 146. It should be noted, however, at the outset that these cases are not concerned with what interest is authorized by Section 292 (a) or how interest is to be determined under Section 722.

River Mills Co. v. *United States*, 119 C. Cls. 350, on facts which, in all material respects, were identical with those of the present case. We regard that holding as both correct and controlling here.

The defendant cites and relies upon the cases of *Manning* v. *Seeley Tube and Box Co.*, 338 U. S. 561, and *Rodgers* v. *United States*, 123 C. Cls. 779, on the theory that insofar as interest is concerned there is no qualitative distinction between the net operating loss carry-back provisions of Section 122 [6] and the application of Section 722. In our opinion these cases are not in point. In the *Seeley Tube* case, *supra*, the taxpayer filed its return
37 for 1941 and paid the amount of tax shown thereon. In 1943, after the taxpayer was bankrupt, the Commissioner determined and assessed a deficiency in the 1941 tax with interest from the date the tax was due to the assessment date. The *Seeley Tube and Box Co.* subsequently filed its return for 1943, disclosing a net operating loss for that year. Under the carry-back provisions of the Code this loss was sufficient to abate completely the tax liability for 1941. Upon suit by the taxpayer the Supreme Court held that plaintiff was not entitled to recover the interest previously assessed on the ground that where a deficiency and interest have been validly assessed under any applicable statutory procedure, a *subsequent* carry-back with an abatement of the deficiency does not abate the interest previously assessed. This holding is as clearly correct as it is inapposite to the case now before us. The Court was dealing there with a situation in which there was no question but that the excess profits tax for 1941, as computed under the only formula available to the taxpayer and with reference to all the economic circumstances of that corporation *in that year*, was underpaid. Also, the tax thus computed was neither "excessive" nor "discriminatory" and no reason existed for any adjustment in the amount exacted until two years after the return was filed and subsequent to the determination and assessment of an admitted deficiency by the Commissioner. The distinction between the "carry-back" provisions and Section 722 is immediately apparent. The former permits an adjustment in a tax which is fair and equitable when imposed, due to unknown and unknowable future economic events which justify relief in a *future taxable period;* the latter affords an alternative mode of computation in the first instance where procedural requirements are met and the economic circumstances of *that taxable year* would give rise to an excessive and discriminatory tax if the usual formula were applied. In other words, given compliance with factual and procedural prerequisites, Section

[6] 26 U. S. C. 122 (b) (1) provides in part that "If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years."

122 is designed to become operable after some economic reversal in a future taxable period, while Section 722 is operable, if at all, from the time the return is filed. In view of this broad difference in purpose and operation of the two Code provisions and
38 the divergent factual situations involved, *The Seeley Tube and Box Co.* case, *supra*, is clearly of little assistance here. The *Rodgers* case, *supra*, involved essentially the same questions and is equally not in point.

Subsection (d) of Section 722[7] is also employed by defendant as justification for the assessment of interest on potential deficiences. The requirement of this subsection that the taxpayer "compute its tax, file its return, and pay the tax shown thereon without the application [of § 722]" is urged as showing conclusively that the assessment of interest was proper here. We do not agree. It is our view that the District Court for the Southern District of Florida properly construed this provision in *Kuder Citrus Pulp Co.* v. *United States.*[8] That court concluded:

> * * * that Section [722 (d)] has nothing whatsoever to do with the question of whether or not interest may be assessed upon a deficiency which would exist except for the relief under Section 722. The [sub] Section does no more than recognize the difficulties inherent in determining the amount of relief properly allowable under Section 722. It does no more than notify a taxpayer that it cannot take advantage of Section 722 on the basis of its own determination but must await determination of available relief by the Commissioner. The Section certainly does not forbid retroactive application of the relief when determined by the Commissioner.

The correctness of this construction is supported by the legislative history of the provision. The Committee Reports indicate persuasively that this provision is merely an administrative aid designed to avoid the prolonged delay in payment of *any* excess profits tax, due to the complexities inherent in the application of Section 722.[9] While there is no doubt that 722 (d) could
39 not be ignored, and the taxpayer could not anticipate the applicability of, or apply, Section 722 in its original return, we

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[7] 26 U. S. C. 722 (d) provides in part:

Application for Relief Under This Section.—The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in Section 710 (a) (5). * * *

[8] U. S. District Court, S. D. Fla., Tampa Div., No. T-2170, Mar. 16, 1953; ¶ 72,487, P-H Fed. Serv. 1953.

[9] Both the House and Senate Reports on the bill containing the provision which became subsection (d) of § 722 contain the fol-

are of the opinion that the remedy for its violation or for failure otherwise to file a substantially correct return is to be found in the penalty provisions of the U. S. Code rather than Section 292 (a), under the provisions of which we think, in view of the facts and circumstances of this case, an attempt has been made to exact illegal and unauthorized interest on "potential" deficiencies never "determined" under the statute nor authorized to be asserted by law.[10]

We are not impressed by defendant's argument that failure to allow the assessment of interest on these "potential" deficiencies not recognized by statute or authorized to be assessed when Section 722 is found, under the facts to be applicable, will encourege delay in payment of the taxes by taxpayers. It may be argued with equal cogency that denial to the taxpayer of the right to undertake in its return to apply Section 722 would encourage dilatory investigation, determination and assessment of taxes under this section on requests for application of Section 722.

In the absence of a clear legislative mandate, which we do not find in the statute, we are constrained not to infer a Congressional intent to authorize and provide for the assessment of interest on a purely theoretical amount which would have been exacted only had Congress not expressly prohibited its imposition, denominating it "excessive and discriminatory." A different conclusion could lead only to the sacrifice of a clearly intended and salutary result (determination and assessment under Sec. 722) to the futile quest

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lowing comment: "Administrative procedure: It is deemed advisable in the interest of good administration, in view of the nature of the problem presented by Section 722, that the taxpayer should not be permitted to apply the section in the computation of the excess profits tax liability shown upon its return and that the taxpayer should be required to conform to reasonable restrictions with respect to the time within which it may make application for the benefits of the section. Accordingly, under the provisions of subsection (e) [(d) in H. Rept.] a taxpayer is not permitted to claim the benefits of section 722 in computing its tax upon the return. A taxpayer, in order to obtain the benefits of section 722, must make an application to the Commissioner of Internal Revenue under regulations to be prescribed by the Commissioner * * *." S. Rept. No. 75, 77th Cong., 1st Sess. p. 13, H. Rept. No. 146, same session at p. 13.

[10] On the record before us it would appear that plaintiff's returns as filed reflected substantially the correct amount of tax under the theory on which those returns were made and the tax computed, i. e., Equity Invested Capital. It was only when the "average earnings" method was employed by the Commissioner that the "potential deficiencies" now in question resulted.

for that degree of technical consistency no longer found, or
40 for that matter required, in Federal revenue legislation.

The parties agree that defendant is entitled to a set-off of $2,926.85. Judgment will, therefore, be entered in favor of plaintiff in the sum of $270,216.34 overassessment and overpayment of interest for 1940 and 1941, together with interest thereon as provided by law.

It is so ordered.

WHITAKER, *Judge;* and JONES, *Chief Judge*, concur.

MADDEN, *Judge*, dissenting.

I respectfully dissent from the decision of the court. I think our decision in the *Henry River Mills* case, in which I joined, was wrong.

I see no escape from the mandate of Section 722 (d) of the Internal Revenue Code. It says, of the very situation here under consideration:

> (d) *Application for Relief Under This Section.*—The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710 (a) (5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose of determining the tax under this subchapter for a subsequent taxable year.

If the plaintiff had done what the statute expressly requires, the Government would have had the money, the interest on which is here in question, until the amount of relief to which the plaintiff was entitled under the provisions of Section 722 (a), (b), and (c), was worked out between the taxpayer and the Government. The simple fact is that the plaintiff failed to pay the tax which the statute imposed and required, and that there was, in fact, a deficiency, which persisted until it was finally learned what
41 relief the plaintiff was entitled to.

The difference between the instant case and cases like *Manning v. Seeley Tube and Box Co.*, 338 U. S. 561, and *Rodgers v. United States*, 123 C. Cls. 779, in which it was held that interest

was payable on deficiencies later wiped out by the carryback of losses from later years, is, as a practical matter, more apparent than real. To be sure, in the carryback cases the data on which the ultimate determination of the tax must be made are not in existence when the taxpayer files his return. But in the Section 722 cases, while in a sense the facts are in existence, they might as well, in a complicated case, not be in existence, for it is plain that it will take much study and analysis and the exercise of much judgment to make the final determination as to the amount of relief to be granted the taxpayer. And, in the meantime, the statute says, he must pay his tax as if Section 722 were not in existence. Section 3771 (g) of the Internal Revenue Code prohibits the Government from paying interest on overpayments resulting from allowance of Section 722 relief for taxable years prior to January 1, 1942, and for later years prohibits interest for any period prior to one year after the filing of an application for relief, or September 16, 1945, whichever is the later. These provisions show the intention of Congress that the money is intended to be collected and held by the Government, as of right, until the question of Section 722 relief is settled.

Findings of Fact

The court having considered the evidence, the report of Commissioner Richard H. Akers, and the briefs and arguments of counsel, makes findings of fact as follows:

1. (a) Koppers United Company was the parent company of a group of corporations which filed consolidated excess profits tax returns for the calendar years 1940 and 1941. The return on Form 1121 for 1940 was filed September 15, 1941, and an amended return on Form 1121 was filed July 21, 1944, with the Collector of Internal Revenue, Pittsburgh, Pennsylvania. The return for 1940 disclosed thereon excess profits net income of $3,656,110.35, an excess profits credit of $3,864,935.25, and showed no tax due. The amended return for 1940 disclosed thereon excess profits net
42 income of $3,653,890.77, an excess profits credit of $3,623,-876.29, an adjusted excess profits net income of $25,014.48, and an excess profits tax liability of $6,512.76. The tax for 1940 was paid to the Collector at Pittsburgh, $3,000 on March 15, 1941, $3,000 on June 13, 1941, and $512.76 on July 21, 1944, by Koppers United Company.

(b) The return on Form 1121 for 1941 was filed June 15, 1942, and an amended return on Form 1121 was filed June 20, 1942, with the Collector of Internal Revenue, Pittsburgh, Pennsylvania. The return for 1941 disclosed thereon excess profits net income of $6,-613,646.26, an excess profits credit of $3,494,726.10, an adjusted excess profits net income of $3,113,920.16, and an excess profits tax liability of $1,822,352.10. The amended return for 1941 disclosed

thereon excess profits net income of $6,545,206.33, an excess profits credit of $3,494,726.10, an adjusted excess profits net income of $3,045,480.23, and an excess profits tax liability of $1,781,288.14. The tax for 1941 was paid to the Collector at Pittsburgh quarterly during 1942 by Koppers United Company.

(c) The returns mentioned in the two paragraphs next above were made and the tax reported thereon was computed without the application of Section 722 of the Internal Revenue Code.

2. Koppers United Company, together with Koppers Company, The Koppers Erecting Corporation and Fuel Investment Associates, each of which companies was included in the consolidated excess profits tax returns of Koppers United Company and Subsidiaries for 1940 and 1941, were merged into Koppers Company, Inc., the plaintiff herein, by virtue of a Certificate of Agreement of Merger filed with the Recorder of Deeds for New Castle County, Delaware, on November 10, 1944.

3. By timely filed consents, the plaintiff, as successor on merger to Koppers United Company, and the Commissioner of Internal Revenue mutually agreed that the amount of any income, excess profits, or war profits tax due by Koppers United Company as parent of the consolidated group for 1940 and 1941 could be assessed at any time on or before June 30, 1951.

43 4. On September 15, 1943, Koppers United Company, as parent of the consolidated group, filed on Form 991 an application for relief under Section 722 of the Internal Revenue Code, claiming thereon a refund of $6,000 of the excess profits tax paid for 1940. On September 10, 1945, an amended application was filed, reducing the amount claimed as a refund for 1940 from $6,000 to $22.56. On September 15, 1943, Koppers United Company, as parent of the consolidated group, filed on Form 991 an application for relief under Section 722 of the Internal Revenue Code, claiming thereon a refund of $1,781,288.14 of the excess profits tax paid for 1941. On November 20, 1945, an amended application was filed reducing the amount claimed as a refund for 1941 from $1,781,288.14 to $541,103.86.

5. On December 16, 1950, the plaintiff, as successor on merger to Koppers United Company, executed an "Agreement to Amount of Constructive Average Base Period Net Income Determined Under Section 722, Internal Revenue Code" (Form EPC-1) for the taxable years 1940 and 1941. The amount of constructive average base period net income agreed to for the year 1940 was $2,801,598.22, and for the year 1941 was $3,394,944.93. These amounts were approved on January 10, 1951, by the Excess Profits Tax Council of the Bureau of Internal Revenue.

6. At various times, the Internal Revenue Agent in Charge at Pittsburgh forwarded to the plaintiff copies of revenue agents' re-

ports covering examinaton of the amended consolidated excess profits tax return of Koppers United Company and Subsidiaries for 1940 in which he proposed excess profits net income, excess profits credits and deficiencies in excess profits tax as follows:

Date of transmittal letter	Proposed excess profits net income 1940	Proposed excess profits credit 1940	Proposed deficiency in excess profits tax—1940
Sept. 23, 1946	$4,158,504 30	$3,612,509 89	$710,753 85
Mar. 1, 1949	3,543,895 44	2,256,809 26	594,385 50
Feb. 9, 1951	3,280,942 26	2,661,518 31	260,554 39

The letter dated February 9, 1951, reflected the agreement reached with respect to the amount of taxable net income for the year 1940 and the amount of relief allowable under Section 722, Internal Revenue Code, as determined by the Excess Profits
44 Tax Council. The relief thus allowed increased the excess profits credit for 1940 to $2,661,518.31, resulting in a decrease in the proposed deficiency in excess profits tax to $260,554.39.

7. At various times, the Internal Revenue Agent in Charge at Pittsburgh forwarded to the plaintiff copies of revenue agents' reports covering examination of the amended consolidated excess profits tax return of Koppers United Company and Subsidiaries for 1941 in which he proposed excess profits net incomes, excess profits credits and deficiencies in excess profits tax as follows:

Date of transmittal letter	Proposed excess profits net income 1941	Proposed excess profits credit 1941	Proposed deficiency in excess profits tax—1941
Apr. 29, 1949	$6,102,978 68	$2,576,117 11	$272,078 42
Feb. 9, 1951	6,353,492 13	3,143,429 68	95,749 33

The letter dated February 9, 1951, reflected the agreement reached with respect to the amount of taxable net income for the year 1941 and the amount of relief allowable under Section 722, Internal Revenue Code, as determined by the Excess Profits Tax Council. The relief thus allowed increased the excess profits credit for 1941 to $3,143,429.68, resulting in a decrease in the proposed deficiency in excess profits tax to $95,749.33.

8. Thereafter and on February 14, 1951, the plaintiff executed and filed with the Internal Revenue Agent in Charge at Pittsburgh, Pennsylvania, a waiver on Treasury Form 874 consenting to the assessment and collection of deficiencies in tax on returns filed for several taxable periods including the calendar years 1940 and 1941 in the respective amounts of $260,554.39 and $95,749.33.

9. In computing the proposed deficiencies set out in the preceding findings, the Commissioner, in accordance with the administrative practice of the Internal Revenue Bureau, first computed the excess profits tax liability for each of the years 1940 and 1941 without the allowance of any relief provided by Section 722. At

that time, February 26 and February 27, 1951, an agreement had been reached between the parties, as shown in findings 6 and 7, both as to the amount of taxable net income and the amount of relief allowable under Section 722. Those computations
45 showed the following results:

	1940	1941
Excess profits net income	$1,289,922.26	$6,353,492.13
Excess profits credit	2,261,809.26	2,576,117.11
Adjusted excess profits net income	1,014,133.00	3,772,375.02
Excess profits tax before application of Section 722	466,921.67	2,208,619.09
Excess profits tax shown on return and paid	6,512.76	1,781,288.14
Excess profits tax before application of Section 722 but after allowing credit for payments made with return	460,408.91	426,730.95

10. After the computations referred to in the preceding findings had been made, the Commissioner gave effect to the relief allowable under Section 722 which reduced the excess profits tax liability for 1940 from $466,921.67 to $267,067.15, that is, in the amount of $199,854.52, and for 1941 from $2,208,619.09 to $1,877,037.47, that is, in the amount of $330,981.62. Against the [illegible]ats so reduced he gave credit for the excess profits tax reported and paid in the same manner as in the previous computations, that is, $6,512.76 for 1940 and $1,781,288.14 for 1941. After the allowance of these credits there was shown a balance of excess profits tax due for 1940 of $260,554.39 and for 1941 of $95,749.33. On March 8, 1951, the Commissioner issued his statutory notice of a determination of deficiencies in the amounts just stated, such notice reading in part as follows:

> You are advised that the determination of your excess profits tax liability for the years ended December 31, 1940, 1941, * * * discloses deficiencies of $260,554.39, $95,749.33, * * * respectively.

No similar notice was given by the Commissioner with respect to the results of his computation of the excess profits tax liability before the application of Section 722.

11. The Bureau of Internal Revenue computed interest for the years 1940 and 1941 as follows: For the year 1940, interest in the sum of $217,376.07 was computed upon $460,408.91 for the period beginning March 15, 1941 (which was the due date of the 1940 return), to January 28, 1949 (which was treated as the date of payment of the deficiency of $260,554.39); and for the year 1941, interest in the sum of $230,504.86 was computed upon $426,730.95 for the period beginning March 15, 1942 (which was the due date of the 1941 return), to March 16, 1951 (which was thirty
46 days after the waiver referred to in finding 8 was filed).

12. On April 17, 1951, pursuant to the waiver filed Feb-

ruary 14, 1951, the Commissioner assessed deficiencies in excess profits tax of $260,554.39 for 1940 and $95,749.33 for 1941 and at the same time assessed interest of $217,376.07 for 1940 and $230,504.86 for 1941. These amounts of tax and interest were paid in full by the plaintiff to the Collector at Pittsburgh. The payments of interest were made on April 24, 1951, upon notice and demand.

13. On June 29, 1951, the plaintiff timely filed a formal claim for refund of part of the interest which had been assessed and paid for the years 1940 and 1941, as stated above. It claimed refunds of $94,358.71 for 1940 and $178,784.48 for 1941, or such greater amounts as legally might be due. Each claim for refund set forth as a ground that the claimed interest was erroneously and illegally collected upon an amount not determined as a deficiency in accordance with Section 292 (a) of the Internal Revenue Code. Each claim said in part:

> The interest was computed on the basis of the excess profits tax which would have been due if the relief provided by Section 722 in computing the excess profits credit had not been allowed.

The plaintiff concedes that the remaining interest to the extent of $123,017.36 was properly assessed on the deficiency for 1940 (six percent on $260,554.39 from 3/15/41 to 1/28/49 and that the remaining interest to the extent of $51,720.38 was properly assessed on the deficiency for 1941 (six percent on $95,749.33 from 3/15/42 to 3/16/51).

14. On December 13, 1951, the Commissioner sent to the plaintiff by registered mail a statutory notice of disallowance of each of its claims for refund.

15. The plaintiff concedes that the set-off in the amount of $2,926.85, alleged by the defendant in paragraph IV of its Answer, is a proper set-off, and that if it is entitled to recover the amount of $273,143.19 claimed in its petition, then that amount should be reduced by the sum of $2,926.85 and judgment entered for the difference.

47-48 CONCLUSION OF LAW

Upon the foregoing findings of fact which are made a part of the judgment herein, the court concludes that, as a matter of law, the plaintiff is entitled to recover.

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of two hundred seventy thousand, two hundred sixteen dollars and thirty-four cents ($270,216.34), together with interest thereon as provided by law.

49 Clerk's Certificate to foregoing transcript omitted in printing.

50 In the United States Court of Claims

No. 78-52

KOPPERS COMPANY, INC., SUCCESSOR ON MERGER TO KOPPERS UNITED COMPANY AND SUBSIDIARIES,

v.

THE UNITED STATES

PROCEEDINGS BEFORE COMMISSIONER AKERS—Jan. 12, 1953

The parties met in Commissioner Akers' office in the United States Court of Claims Building, Washington, D. C., at 10:30 a. m. on January 12, 1953.

Present:

HON. RICHARD H. AKERS, Commissioner;
DAVID W. RICHMOND, Esq., counsel for plaintiff;
JOHN A. REES, Esq., counsel for defendant.

COMMISSIONER AKERS: At the call of the Calendar this morning and after an indication by the parties that there was a disagreement between them on questions of fact, as shown by the affidavits which had been filed in connection with motions for summary judgment, the Court referred the matter to me for the purpose of allowing the parties to submit their evidence in support of the motions and have me prepare a report of facts to the Court.

51 Mr. RICHMOND: As to the affidavits of the plaintiff appearing at pages 21 to 23, both inclusive, of the record, it is stipulated that if Mr. R. E. Gray were called as a witness he would testify in accordance with said affidavits.

Mr. REES: Counsel also agree that separate affidavits subscribed and sworn to by Arthur L. Guess and Richard R. McLaughlin on December 31, 1952, represent the testimony these gentlemen would give if they were called as witnesses for the defendant and properly sworn at a hearing before Commissioner Akers.

Mr. RICHMOND: While we do agree that if Mr. Guess and Mr. McLaughlin were called to testify they would testify in accordance with the affidavits already submitted, we reserve the right to argue that the words "deficiency" and "determination", as used in those affidavits, are conclusions of law and not facts.

COMMISSIONER AKERS: With that reservation, you are willing to have the affidavits stand as the testimony which these witnesses would give if they were called?

Mr. RICHMOND: Yes, sir.

COMMISSIONER AKERS: And with respect to the affidavit referred to by Mr. Richmond, I assume that you are willing to accept that

affidavit as the testimony which that witness would give if
52 called to testify.

Mr. REES: Yes.

COMMISSIONER AKERS: With the submission of these affidavits does that, with the pleadings, constitute the entire proof which both parties desire to have submitted in this action in connection with the motions for summary judgment?

Mr. RICHMOND: Yes.

Mr. REES: I wish to offer in evidence uncertified photostatic copies of the exhibits which are attached to the affidavit of Mr. McLaughlin.

COMMISSIONER AKERS: I had understood on that Mr. Rees that the exhibits which were attached to the affidavits as submitted by you would be considered as a part of the exhibit.

Mr. REES: With that understanding Mr. Commissioner, I withdraw my offer.

Mr. RICHMOND: That is our understanding also.

COMMISSIONER AKERS: The record as now made would be sufficient so far as both of you are concerned for the submission of the case on findings to be prepared by me?

Mr. REES: Yes.

Mr. RICHMOND: Yes. Does your Honor want proposed findings from us? I presume so.

53 COMMISSIONER AKERS: Plaintiff is given until January 15, 1953, within which to file its proposed findings of fact, and defendant is given until January 19, 1953, within which to make comments on or objections to plaintiff's proposed findings or to submit substitute findings.

Trial adjourned.

[Reported by Mildred Trotter]

54 In the United States Court of Claims

[Title omitted]

AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—Filed Jan. 9, 1953

CITY OF WASHINGTON,
Dist. of Columbia, ss:

Richard R. McLaughlin, full age, being duly sworn and on his oath according to law, deposes and says:

That he is now an Abnormality Claims Reviewer in the Collection Division, Bureau of Internal Revenue, Department of the Treasury,

and as such has custody of the Bureau's administrative files containing the records of Koppers Company, Inc., for its tax years ending December 31, 1940 and 1941.

That his duties now, and for the past seven years, have included the examination of the records of taxpayers and of the Bureau, as contained in the Bureau's administrative files in those cases in which are involved relief under section 722, Internal Revenue Code, to ascertain the interest owed to taxpayers by the United States and interest owed by taxpayers to the United States following determinations made by the Commissioner of Internal Revenue and adjustments made by him in connection with liabilities of taxpayers for income and declared value excess profits and excess profits taxes. Duties include the determination of the interest applicable to overpayments or deficiencies attributable to adjustments
55 involving relief under the provisions of Section 722 of the Internal Revenue Code.

In making interest determinations it is the administrative practice of the Bureau (A) to allow a taxpayer interest on all overpayments resulting from a reduction in income or excess profits taxes due to standard adjustments other than those arising from relief provisions including Section 722, and (B) to charge a taxpayer interest on all deficiencies resulting from increases in income or excess profits taxes due to adjustments other than those arising from such relief provisions. In cases where all or any part of an excess profits tax deficiency resulting from standard adjustments determined without the application of Section 722 relief is extinguished by the application of such relief, it is the Bureau policy to assess only the net deficiency together with interest on the entire deficiency from the date the return is due until the appropriate terminal date. This includes interest on the portion of the deficiency extinguished by relief under section 722.

The usual administrative procedure of the Bureau in any case where proper application is made for relief under Section 722 is first to determine the correct tax liability which should have been computed, returned and paid as provided in Section 722(d); second to ascertain the amount of relief allowable and make appropriate adjustments; third to determine the net deficiency to be assessed and collected or the overpayment to be refunded; and fourth to determine the interest due on any deficiency or on any overpayment resulting from standard adjustments other than Section 722 relief. This procedure of the Bureau of Internal Revenue was followed in the case of Koppers Company, Inc., for the taxable years ended December 31, 1940 and 1941.

56 Koppers United Company, hereinafter referred to as the taxpayer, was the parent company of a group of corpora-

tions which filed consolidated returns of federal excess profits tax on Treasury Form 1121 for the calendar years 1940 and 1941 with the Collector of Internal Revenue at Pittsburgh, Pennsylvania. These corporations were merged into Koppers Company, Inc., by virtue of a Certificate of Agreement of Merger filed with the Recorder of Deeds at New Castle, Delaware, on November 10, 1944.

The taxpayer's 1940 return was filed on September 15, 1941, reporting an excess profits net income of $3,656,110.35, an excess profits credit of $3,864,935.25, and showed no tax due. On July 21, 1944, an amended 1940 return was filed showing an excess profits net income of $3,653,890.77, an excess profits credit of $3,623,876.29, an excess profits net income of $25,014.48, and reported a tax liability of $6,512.76. This sum was timely assessed and paid.

The taxpayer's 1941 return was filed on June 15, 1942. It reported an excess profits net income of $6,613,646.26, an excess profits credit of $3,494,726.10, an excess profits net income of $3,113,920.16, and an excess profits tax liability of $1,822,352.10. On June 20, 1942, an amended return was filed for 1941 reporting an excess profits net income of $6,545,206.33, an excess profits credit of $3,494,726.10, an excess profits net income of $3,045,480.23, and an excess profits tax liability of $1,781,288.14. This sum was timely assessed and paid.

The returns mentioned in the two paragraphs next above were made and the tax reported thereon was purportedly computed without the application of Section 722 of the Internal Revenue Code. Photostat copies of each return, marked Exhibits A, B, C and D, respectively, are attached.

On September 15, 1943, the taxpayer filed an application for relief under Section 722 of the Code claiming thereon a refund of $6,000 of the excess profits tax paid for the year 1940. On
57 September 10, 1945, an amended application was filed reducing the amount claimed as a refund for 1940 to $22.56. On September 15, 1943, an application was filed for relief under section 722 claiming a refund of the full amount paid as excess profits tax for the year 1941. On November 20, 1945, an amended application was filed for 1941 reducing the amount claimed as a refund to $541,103.86. Photostat copies of the four applications, marked Exhibits E, F, G and H, respectively, are attached.

Thereafter and on final audit of the taxpayer's 1940 and 1941 returns in the Bureau of Internal Revenue, in accordance with the administrative practice shown above, it was first determined that the correct excess profits tax liability which should have been re-

turned and paid without the benefit of any relief provided in Section 722 was as follows:

	1940	1941
Excess profits net income	$3,280,942 26	$6,353,192 13
Excess profits credit	2,261,809 26	2,576,117 11
Adjusted excess profits net income	1,014,133 00	3,772,375 02
Excess profits tax liability	466,921 67	2,208,019 09
Excess profits tax deficiency	460,408 91	426,730 95

Photostat copies of the original Bureau determinations, marked Exhibits I and J, are attached.

The Commissioner of Internal Revenue adopted as his own determination the determinations made in the final audit of the taxpayer's returns for the calendar years 1940 and 1941, as stated in the paragraph next above, and the Commissioner thereupon correctly determined that the taxpayer's excess profits taxes for the year 1940, computed without the application of Section 722, was in the amount of $466,921.67 and for the year 1941 was in the amount of $2,208,019.09.

The Commissioner further correctly determined that before application of Section 722 relief there was a deficiency in the taxpayer's 1940 excess profits taxes in the amount of $460,408.91 and in its 1941 excess profits taxes in the amount of $426,730.95.

58 The Commissioner further correctly determined that after application of Section 722 relief there was an unextinguished deficiency in the taxpayer's 1940 excess profits taxes in the amount of $260,554.39 and in its 1941 excess profits taxes in the amount of $95,749.33.

Thereafter and on February 14, 1951, Koppers Company, Inc., executed and filed with the Internal Revenue Agent in Charge at Pittsburgh, Pennsylvania, a waiver on Treasury Form 874 consenting to the assessment and collection of deficiencies in tax on returns filed for several taxable periods including the calendar years 1940 and 1941 in the respective amounts of $260,554.39 and $95,749.33. A photostat copy of this waiver is attached and marked Exhibit K.

Interest was computed on the excess profits tax deficiencies for the years 1940 and 1941, determined by the Commissioner as set forth above, as follows: For the years 1940, interest in the sum of $217,376.07 was computed upon $460,408.91 for the period beginning March 15, 1941 (which was the due date of the 1940 return), to January 28, 1949 (which was treated as the date of payment of the net deficiency of $260,554.93); and for the year 1941, interest in the sum of $230,504.86 was computed upon $426,730.95 for the period beginning March 15, 1942 (which was the due date of the 1941 return), to March 16, 1951 (which was thirty days after the waiver—Exhibit K was filed).

On April 17, 1951, pursuant to the waiver filed February 14, 1951

(Exhibit K), the Commissioner of Internal Revenue assessed deficiencies in the excess profits tax of $260,554.39 for 1940 and $95,749.33 for 1941 and at the same time assessed interest of $217,376.07 for 1940 and $230,504.86 for 1941. These amounts of tax and interest were paid in full by Koppers Company, Inc., to the Collector at Pittsburgh. The payments of interest were made on April 24, 1951, upon notice and demand. Photostat copies of regis-
59 tered letter dated March 8, 1951, marked Exhibit L, and of the assessment List, marked Exhibit M, are attached.

On June 29, 1951, Koppers Company, Inc., filed with the Collector claims for refund on Treasury Form 843 for part of the interest paid as stated in the paragraph next above. Photostat copies of separate claims filed for 1940 and for 1941, marked Exhibits O and P respectively, are attached. The 1940 claim asked a refund of $94,358.71 and the 1941 asked a refund of $178,784.48, or such greater amounts as legally might be due.

On December 13, 1951, the Commissioner of Internal Revenue sent Koppers Company, Inc., by registered mail a statutory notice of the disallowance of each of its claims for refund.

(S.) RICHARD R. MCLAUGHLIN.

Subscribed and sworn to before me this 31st day of December, 1952.

(S.) Erma W. Dudley, Notary Public.

My commission expires June 14, 1956.

60 EXHIBIT "I" TO AFFIDAVIT

INSTRUCTIONS

10. The amounts shown in Column (J) represent the adjustments to the taxes previously assessed after giving effect to all adjustments shown in the preceding columns, and are not to be used for the purpose of determining the amounts of interest to be assessed or allowed. The deficiencies or overassessments shown in Columns (A) to (I), inclusive will not be separately assessed or allowed but are reflected in the final determination set forth in Column (J).

11. This form is to be prepared for a taxable year in which any of the following adjustments are involved:

(a) Concurrent adjustments resulting from the application of the general provisions of law (Column (A)) and some one or several of the specific sections of law on which interest is restricted (Columns (B) to (I), inclusive).

(b) Net operating loss carry-backs from two succeeding years.

(c) Section 722 adjustments.

(d) Unused excess profits credit carry-back adjustments, either under section 710(c) or section 722.

(Here follows 1 photo, folio 61.)

NOT TO BE CONSIDERED OR DESTROYED AFTER ADMINISTRATIVE ACTION BY THE CLEARING DIVISION. AFFACH CORRECTED FORM.

(Taxable year ended)

	(A) General adjustments and computation of facilities acquired subsequent to June 10, 1940	(B) Other adjustments: Interest restricted under: Sec. ___ INC Sec. ___ INC	(C) Net operating loss carry-back adjustment from year ___ 1st year Claim filed:	(D) Net operating loss carry-back adjustment from year ___ 2nd year Claim filed:	(E) Section 722 adjustments filed:	(F) Unused excess profits credit carry-back adjustment from year ___ 1st year Claim filed:	(G) Unused excess profits credit carry-back adjustment under Sec. 722 from yr 1st year ___ filed:	(H) Unused excess profits credit carry-back adjustment from year ___ 2nd year Claim filed:
1. Net income for EPTP tax computation								
2. Net adjustments								
3. Corrected balance subject to EPTP tax								
4. EPTP tax								
5. EPTP tax previously determined								
6. Deficiency or (overassessment)								
* 7. Tentative adjustment deficiency or (O.A.)								
* 8. Net deficiency or (overassessment)								
9. Adjusted net income for income tax purposes								
10. Net adjustments								
11. Corrected adjusted net income								
12. Less: Excess profits tax, or								
13. Income subject to excess profits tax								
14. Dividends received credit								
15. Corrected normal-tax net income								
16. Income tax								
17. Income tax previously determined								
18. Deficiency or (overassessment)								
19. Tentative adjustment deficiency or (O.A.)								
20. Net deficiency or (overassessment)								
21. Excess profits net income 55	3,453,890.77				3,280,944.16			
22. Net adjustments	372,998.61							
23. Corrected excess profits net income	3,280,944.16							
24. Less: Specific exemption	5,000.				5,000.			
25. Excess profits credit	2,261,509.16				2,661,518.31			
26. Unused excess profits credit								
27. Corrected adjusted excess profits net income	1,014,433.00				614,433.85			
28. Excess profits tax	461,066.80				261,211.92			
29. Section 726(a)(2) deferment								
30. Section 710 credit	5,855.13				5,855.13			
31. Unused profits tax loss credit	456,921.67				267,067.05			
32. Excess profits tax previously determined	67,513.76				466,921.67			
33. Deficiency or (overassessment)	960,408.97				(199,854.51)			
34. Tentative adjustment deficiency or (O.A.)								
35. Net deficiency or (overassessment)								

Amounts representing overassessments should be enclosed in parentheses.
Opinion will be made in the Clearing Division as required.

Prepared by CB Field B-4 Date 2-16-54

Forms 1120 and 1479 prepared by _____ Field _____ Date _____

_____ Field _____ Date _____

● Consolidated for excess profits tax
No change in income tax

(Taxable year ended)

	(A) General adjustments and computation of facilities acquired subsequent to June 10, 1940	(B) Other adjustments: Interest restricted under: Sec. ___ INC Sec. ___ INC	(C) Net operating loss carry-back adjustment from year ___ 1st year Claim filed:	(D) Net operating loss carry-back adjustment from year ___ 2nd year Claim filed:	(E) Section 722 adjustments filed:	(F) Unused excess profits credit carry-back adjustment from year ___ 1st year Claim filed:	(G) Unused excess profits credit carry-back adjustment under Sec. 722 from yr 1st year ___ filed:	(H) Unused excess profits credit carry-back adjustment from year ___ 2nd year Claim filed:	(I) Unused excess profits credit carry-back adjustment under Sec. 722 from yrs 2nd year ___ filed:	(J) After all adjustments
	3,453,890.77				3,280,944.16					3,280,944.16
	372,998.61									
	3,280,944.16									
	5,000.				5,000.					5,000.
	2,261,509.16				2,661,518.31					2,661,518.31
	1,014,433.00				614,433.85					614,433.85
	461,066.80				261,211.92					261,211.92
	5,855.13				5,855.13					5,855.13
	456,921.67				267,067.05					267,067.05
	67,513.76				466,921.67					6,513.76
	960,408.97				(199,854.51)					260,358.97

should be enclosed in parentheses.
Division as required.

Prepared by CB Field B-4 Date 2-16-54

Forms 1120 and 1479 prepared by _____ Field _____ Date _____

_____ Field _____ Date _____

consolidated for excess profits tax
change in income tax

Revised October 1948

19

36A

62 EXHIBIT "J" TO AFFIDAVIT

INSTRUCTIONS

10. The amounts shown in Column (J) represent the adjustments to the taxes previously assessed after giving effect to all adjustments shown in the preceding columns, and are not to be used for the purpose of determining the amounts of interest to be assessed or allowed. The deficiencies or overassessments shown in Columns (A) to (I), inclusive, will not be separately assessed or allowed but are reflected in the final determination set forth in Column (J).

11. This form is to be prepared for a taxable year in which any of the following adjustments are involved:

(a) Concurrent adjustments resulting from the application of the general provisions of law (Column (A)) and some one or several of the specific sections of law on which interest is restricted (Columns (B) to (I), inclusive).

(b) Net operating loss carry-backs from two succeeding years.

(c) Section 722 adjustments.

(d) Unused excess profits credit carry-back adjustments, either under section 710(c) or section 722.

…BE CORRECTED OR DESTROYED AFTER ADMINISTRATIVE
…S BY THE CLEARING DIVISION. ATTACH CORRECTED FORMS.

/ .41
(Taxable year ended)

	(A) General adjustments and amortization of facilities acquired subsequent to June 10, 1940	(B) Other adjustments: Interest restricted under: Sec.___ IRC Sec.___ IRC	(C) Net operating loss carry-back adjustment from year___ 1st year Claim filed:	(D) Net operating loss carry-back adjustment from year___ 2nd year Claim filed:	(E) Section 722 adjustments filed:	(F) Unused excess profits credit carry-back adjustment from year___ 1st year Claim filed:	(G) Unused excess profits credit carry-back adjustment under Sec. 722 from yr 1st year___ filed:	(H) Unused excess profits credit adjustment from year___ 2nd year Claim filed:	(I) Unused excess profits credit carry-back adjustment under Sec. [illegible] from yr 2nd year___ filed:	(J) After all adjustments
1. Net income for DVEP tax computation										
2. Net adjustments										
3. Corrected balance subject to DVEP tax										
4. DVEP tax										
5. DVEP tax previously determined										
6. Deficiency or (overassessment)										
* 7. Tentative adjustment deficiency or (O.A.)										
* 8. Net deficiency or (overassessment)										
9. Adjusted net income for income tax purposes										
10. Net adjustments										
11. Corrected adjusted net income										
12. Less: Excess profits tax, or										
13. Income subject to excess profits tax										
14. Dividends received credit										
15. Corrected normal-tax net income										
16. Income tax										
17. Income tax previously determined										
18. Deficiency or (overassessment)										
*19. Tentative adjustment deficiency or (O.A.)										
*20. Net deficiency or (overassessment)										
21. Excess profits net income	6,545,206.33				6,353,492.18					6,353,492.18
22. Net adjustments										
23. Corrected excess profits net income	6,353,492.18									
24. Less: Specific exemption	5,000				5,000					5,000
25. Excess profits credit	2,576,117.11				3,143,429.68					3,143,429.68
26. Unused excess profits credit										
27. Corrected adjusted excess profits net income	3,772,375.02				3,205,062.46					3,205,062.45
28. Excess profits tax	2,217,425.01				1,877,037.47					1,877,037.47
29. Section 710(a)(3) deferment										
30. Section ___ credit										
31. Excess profits tax less credits	2,208,019.09	2,217,425.01	9,405.92 FOREIGN	TAX-	1,877,037.47					1,877,037.47
32. Excess profits tax previously determined	1,781,288.14	2,208,019.09		-CREDIT	2,208,019.09					1,781,2[illegible]
33. Deficiency or (overassessment)	426,730.95				<330,981.62>					95,7[illegible]
*34. Tentative adjustment deficiency or (O.A.)										
*35. Net deficiency or (overassessment)										

Amounts representing overassessments should be enclosed in parentheses.
*Entries will be made in the Clearing Division as required.

Prepared by eB Br. 37 Date 2-7-51
Forms 1286 and 1479 prepared by ______ Br.Cl.CC. ______ Date ______
______ Br.Cl.A. ______ Date ______

Consolidated for excess profits tax
Separate returns filed for income taxes –
– See attached M-984's for income taxes

~~Allocation of Excess Profits tax shown on Exhibit "A" attached~~

Noted no. 39 6-13-51

[illegible] - Revised
December 1948

63

38A

64 In the Supreme Court of the United States

October Term, 1953

No. —

THE UNITED STATES OF AMERICA, PETITIONER,

v.

KOPPERS COMPANY, INC., SUCCESSOR ON MERGER TO KOPPERS UNITED COMPANY AND SUBSIDIARIES, RESPONDENT

STIPULATION AS TO PRINTING RECORD

It is hereby stipulated and agreed, by and between counsel for the respective parties to the above-entitled cause, that, for the purpose of the petition for a writ of certiorari and, in the event the petition be granted, for the purpose of hearing and determining the case on the merits, only the following portions of the record shall be printed:

I. Petition.
II. Answer
III. Amended answer.
IV. Proceedings following filing of defendant's answer.
V. Report of the Commissioner.
VI. Argument and submission of case.
VII. Opinion of the Court by Littleton, Judge, findings of fact and conclusions of law.
VIII. Proceeding before Commissioner Akers January 12, 1953.
IX. Affidavit of Richard A. McLaughlin in support of defendant's (the United States) motion for summary judgment.
X. Exhibit "I" in support of affidavit—original Bureau computation of correct excess profits tax liability of Koppers United Company for 1940.
65 XI. Exhibit "J" in support of affidavit—original Bureau computation of correct excess profits tax liability of Koppers United Company for 1941.

It is further stipulated and agreed that the parties hereto may refer in the petition for writ of certiorari, briefs and arguments to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

(S.) ROBERT L. STERN,
Acting Solicitor General,
Counsel for the Petitioner.

(S.) DAVID W. RICHMOND,
Counsel for the Respondent.

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Supreme Court of the United States

No. 609, October Term, 1953

THE UNITED STATES, PETITIONER

v.

KOPPERS COMPANY, INC., SUCCESSOR ON MERGER TO KOPPERS UNITED COMPANY AND SUBSIDIARIES

Order allowing certiorari

Filed May 17, 1954

The petition herein for a writ of certiorari to the United States Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

No. 29

In the Supreme Court of the United States

OCTOBER TERM, 1953

THE UNITED STATES, PETITIONER

v.

KOPPERS COMPANY, INC., SUCCESSOR BY MERGER TO KOPPERS UNITED COMPANY AND SUBSIDIARIES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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OCTOBER TERM, 1953

No. 609

THE UNITED STATES, PETITIONER

v.

KOPPERS COMPANY, INC., SUCCESSOR ON MERGER TO KOPPERS UNITED COMPANY AND SUBSIDIARIES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled cause on December 1, 1953.

OPINION BELOW

The opinion of the Court of Claims (R. 14-25), entered December 1, 1953, is not yet officially reported.

JURISDICTION

The opinion and judgment of the Court of Claims were entered December 1, 1953. (R. 24.)

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255(1).

QUESTION PRESENTED

Whether the Government is entitled to interest on the full amount of deficiencies of excess profits taxes from the time the returns were due, where the deficiencies were diminished by reason of the allowance of relief under Section 722 of the Internal Revenue Code, or on only the net amounts of the deficiencies after allowance of Section 722 relief.

STATUTES INVOLVED

The applicable portions of the pertinent statutes are set forth in the Appendix, *infra*, pp. 15-22.

STATEMENT

The findings of fact of the Court of Claims may be summarized as follows:

The taxpayer [1] is a corporation which filed its excess profits tax returns for 1940 and 1941 and later filed amended returns for such years and paid the income and excess profits taxes shown due thereon. These returns were made and the taxes computed without the application of Section 722 of the Internal Revenue Code, which provides relief for any taxpayer who establishes that in the particular circumstances the computation of the excess profits tax is "excessive and discriminatory" (*infra*, p. 17). (R. 25-26.)

[1] Both the Koppers United Company and the Koppers Company, its successor, are referred to as the taxpayer for convenience.

On September 15, 1943, the taxpayer filed applications for relief under Section 722 of the Internal Revenue Code for the years 1940 and 1941. Amended applications were filed on September 10, 1945 and November 20, 1945. (R. 26.)

On December 16, 1950, the taxpayer executed an agreement as to the amount of constructive average base period net income under Section 722 for the years 1940 and 1941, which amounts were approved on January 10, 1951, by the Excess Profits Tax Council of the Bureau of Internal Revenue (now the Internal Revenue Service). (R. 26.)

At various times the Internal Revenue Agent in Charge at Pittsburgh forwarded to taxpayer copies of Revenue Agents' reports covering examination of its excess profits tax returns for 1940 and 1941. In one of these reports dated February 9, 1951, there was proposed a deficiency for 1940 of $260,554.39 and for 1941 of $95,749.33. These amounts reflected the deficiencies after the relief allowable under Section 722 as determined by the Excess Profits Tax Council. (R. 27.)

On February 14, 1951, taxpayer filed a waiver on Treasury Form 874 consenting to the assessment and collection of deficiencies in tax for 1940 and 1941, in the respective amounts of $260,554.39 and $95,749.33. (R. 27.)

In computing the proposed deficiencies referred to above, the Commissioner of Internal Revenue, in accordance with the usual administrative practice of the Internal Revenue Service, first computed the excess profits tax liability for each of the

years 1940 and 1941 without the allowance of any relief provided by Section 722 and determined deficiencies as the result of such computation in the amounts of $460,408.91 for 1940 and $426,730.95 for 1941. (See affidavit of Mr. McLaughlin attached to the Government's motion for summary judgment.) After these computations had been made, the Commissioner gave effect to the relief allowable under Section 722 which reduced the excess profits tax liability for 1940 and 1941 and resulted in a balance of excess profits tax due for 1940 of $260,554.39 and for 1941 of $95,749.33. On March 8, 1951, the Commissioner issued a statutory notice of deficiencies in the amounts just stated. (R. 27-28.)

The Internal Revenue Service computed interest for the years 1940 and 1941 as follows: For the year 1940, interest in the sum of $217,376.07 was computed upon $460,408.91 for the period beginning March 15, 1941 (which was the due date of the 1940 return), to January 28, 1949 (which was treated as the date of payment of the deficiency of $260,-554.39); and for the year 1941, interest in the sum of $230,504.86 was computed upon $426,730.95 for the period beginning March 15, 1942 (which was the due date of the 1941 return), to March 16, 1951 (which was 30 days after the waiver of February 14, 1951, was filed). (R. 28.)

On April 17, 1951, pursuant to the waiver filed February 14, 1951, the Commissioner assessed deficiencies in excess profits taxes of $260,554.39 for

1940 and $95,749.33 for 1941 and at the same time assessed interest of $217,376.07 for 1940 and $230,504.86 for 1941. These amounts of tax and interest were paid in full by the taxpayer to the Collector at Pittsburgh. (R. 28-29.)

Claims for refund were filed, claiming refunds of interest paid of $94,358.71 for 1940 and $178,784.48 for 1941. The amounts claimed, with one minor adjustment, represent the excess of the interest paid over the amount of interest due on that portion of the deficiencies which were actually assessed. These claims were based upon the ground that the claimed interest was erroneously and illegally collected upon an amount not determined as a deficiency in accordance with Section 292(a) of the Internal Revenue Code. These claims were rejected and this suit instituted in the Court of Claims within two years of such rejection. (R. 29.)

Upon the above facts the Court of Claims held that the taxpayer was entitled to recover the interest sued for and entered judgment for the taxpayer in the amount of $270,216.34, together with interest thereon as provided by law. (R. 29.)

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Claims, allowing the taxpayer to recover interest paid on deficiencies in excess profits taxes for the years 1940 and 1941, is in direct conflict with that of the Court of Appeals for the Fifth Circuit in *United States* v. *Premier Oil Refining Co.*, decided January 6, 1954

(1954 P-H, par. 72,289).[2] In the latter case the Court of Appeals expressly stated its agreement with the dissenting opinion in the instant case.

The excess profits tax as imposed by the Second Revenue Act of 1940, c. 757, 54 Stat. 974, was based on a percentage of adjusted excess profits net income. In arriving at such adjusted excess profits net income a credit was allowed which was computed on either the income credit method or the invested capital credit method. In the income credit method the credit was a certain percentage of the average base period net income, i.e., the average annual income of a certain prior base period. Section 722 of the Internal Revenue Code, Appendix, *infra*, pp. 17-22, was enacted primarily to provide relief for certain taxpayers where the use of the annual base period net income or the statutory invested capital resulted in an excessive or discriminatory tax. Section 722(a), Appendix, *infra*, pp. 17-18, provides that in any case where the taxpayer (1) establishes that the tax computed otherwise is an excessive and discriminatory tax and (2) establishes what would be a fair and just amount representing normal earnings for the base period, the tax shall be determined by using such constructive average base period net income in lieu of the statutory average base period net income.

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[2] A petition for rehearing has been filed by the taxpayer in the *Premier Oil* case. That case involved the years 1943, 1944 and 1945, and the petition for rehearing raises one issue on the facts for 1944 and 1945, which is not involved in the instant case. In so far as the year 1943 is concerned, the question is identical with that presented in the instant case.

Section 722(d), Appendix, *infra*, pp. 21-22, provides that the taxpayer shall compute its tax, file its return, and pay the tax shown due thereon without the application of Section 722, and that the benefits of Section 722 shall not be allowed unless the taxpayer within a certain time makes application therefor in accordance with regulations prescribed by the Commissioner of Internal Revenue.

In the instant case, the taxpayer filed its returns and paid the taxes shown due thereon. However, the returns did not reflect the correct tax due and the Commissioner of Internal Revenue, after examination and audit, determined deficiencies in excess profits taxes for the years 1940 and 1941, in the respective amounts of $460,408.91 and $426,730.95, resulting from adjustments to income for each year other than adjustments under Section 722. Prior to the actual assessment of these deficiencies, in accordance with Section 272(a) of the Internal Revenue Code, Appendix, *infra*, pp. 15-16, it had also been determined that the taxpayer was entitled to relief under Section 722 of the Internal Revenue Code. The allowance of this relief reduced the amounts of the deficiencies and the Commissioner assessed deficiencies for those years in only the net amounts of $260,554.39 for 1940, and $95,749.33 for 1941. The taxpayer agreed to the assessment of the deficiencies in these amounts. The Commissioner of Internal Revenue, in accordance with his usual practice, computed and assessed interest on the total amounts of the de-

ficiencies before allowance of Section 722 relief, which was duly paid.[3]

The basis of the Court of Claims decision is that since the constructive average base period net income when finally determined is used to *determine* the tax liability rather than to merely offset the result of computations based on the statutory average base period net income, the Commissioner of Internal Revenue must take cognizance of Section 722 in "determining" a deficiency and that it is only the amount of the deficiency remaining after such computation which is a real deficiency within the meaning of the statute. It concluded that there is no statutory authority in the Commissioner to collect interest on any amount in excess of the amount of the deficiency actually assessed. On the other hand, the Court of Appeals for the Fifth Circuit in the *Premier Oil* case held that a deficiency determined before the allowance of relief under Section 722 was a real deficiency even though not assessed, that Section 272(a) does not require a separate formal notice of determination and assessment of an extinguished deficiency, and that the taxpayer could not recover the interest paid on such extinguished deficiencies.[4]

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[3] Taxpayer conceded that it owed the interest on the amounts of the deficiencies actually assessed. It is only the interest on the difference between the total amounts and the net amounts that is in controversy.

[4] In two of the years before the Court of Appeals the allowance of relief under Section 722 extinguished the deficiency in full, resulting in an overassessment of tax. This factual difference is not material. Cf. *Henry River Mills Co.* v. *United States*, 96 F. Supp. 477 (C. Cls.), in which the allowance of

As already stated the facts in the *Premier Oil* case, at least with respect to the year 1943, are for all practical purposes identical with those in the instant case. Although the Court of Claims refers to the deficiencies as "potential" deficiencies never "determined" under the statute (R. 23), it has found that the Commissioner "computed" the excess profits tax liability for each year prior to the allowance of Section 722 relief. (R. 27.) The facts, which are undisputed,[5] show a "determination" of a deficiency for each of the years involved as that term is used in the *Premier Oil* case. The Court of Appeals in that case refused to accept the finding of the District Court for the Northern District of Texas, which had decided the case in favor of the taxpayer (107 F. Supp. 837), that the deficiencies were never determined and after referring to the record, which consists mainly of the pleadings, exhibits and affidavits, concluded that there was a determination of a deficiency for each of the years involved.[6] The court relied upon an

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relief under Section 722 extinguished the deficiency *in toto*, resulting in an overassessment and which the court below in the instant case regarded as involving identical facts. (R. 20-21.)

[5] Prior to the reference of this case by the Court of Claims to a Commissioner, the Government had filed a motion for summary judgment accompanied by affidavits and exhibits. At the hearing before the Commissioner of the Court, it was stipulated that if the affiants were called to testify they would testify in accordance with the affidavits, the taxpayer reserving the right to argue that the words "deficiency" and "determination" as used in the affidavits were conclusions of law and not facts. (R. 30-31.)

[6] The question of whether the deficiencies were "computed" or "determined" may not be material particularly if this Court adopts the view of the Court of Appeals that "Section 272(a)

affidavit of an Abnormality Claims Reviewer in the Collection Division of the Internal Revenue Service, which affirmatively showed that the Commissioner made a determination of a deficiency for each year, prior to the allowance of relief under Section 722. In the instant case, an affidavit attached to the Government's motion for summary judgment, executed by an Abnormality Claims Reviewer in the same Division, shows that the deficiencies were determined prior to the allowance of Section 722 relief in the total amounts upon which the interest was assessed. (R. 33-34; see also Exs. I and J attached to the Government's motion for summary judgment (R. 35-38A).)

2. The decision below is in conflict, in principle, with the decision of this Court in the case of *Manning* v. *Seeley Tube & Box Co.*, 338 U.S. 561. The *Seeley* case involved income and excess profits tax deficiency for the year 1941, which, together with interest, was assessed and paid and later eliminated as a result of a net operating loss carry-back from the year 1943. This Court held that the Government was entitled to retain the interest assessed even though as a result of a net loss carry-back the deficiency was later eliminated in full, resulting in an overpayment for 1941, upon the basic theory

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does not specifically require a separate formal notice of determination and assessment of an extinguished deficiency." See also *Surface Combustion Corp.* v. *United States* (N.D. Ohio), decided November 25, 1953 (1953 P-H, par. 72,804), now on appeal to the Court of Appeals for the Sixth Circuit, where the District Court allowed the taxpayer to recover interest paid on an assessed deficiency which was later extinguished by allowance of relief under Section 722.

that the statute contemplated that the taxpayer should return and pay the correct amount of tax regardless of the net loss sustained in a later year and that the Government should not be deprived of the interest rightfully due it because of failure on the part of the taxpayer to return and pay the correct tax.[7] This Court stated in the *Seeley Tube* case (338 U.S. 561, 566): "For that period the taxpayer, by its failure to pay the taxes owed, had the use of funds which rightfully should have been in the possession of the United States. The fact that the statute permits the taxpayer subsequently to avoid the payment of that debt in no way indicates that the taxpayer is to derive the benefits of the funds for the intervening period." The same is true of the instant case. As Judge Madden, dissenting below, stated (R. 24): "If the plaintiff had done what the statute expressly requires, the Government would have had the money, the interest on which is here in question, until the amount of relief to which the plaintiff was entitled

[7] This Court in the *Seeley* case refused to decide whether a different result would be reached where the loss was claimed before the assessment of the deficiency. However, the Court of Claims itself held in the case of *Rodgers* v. *United States*, 108 F. Supp. 727, decided after the *Seeley* case, that the Government could rightfully collect interest on a deficiency determined but not assessed due to the fact that prior to the actual assessment thereof it was extinguished by a net loss carry-back. The Court of Appeals for the Sixth Circuit reached the same result in *Cumberland Portland Cement Co.* v. *United States*, 202 F. 2d 152, affirming *per curiam* the decision of the District Court for the Middle District of Tennessee (101 F. Supp. 577), as did the District Court for the Western District of Tennessee in *DeSoto Hardwood Flooring Co.* v. *United States*, decided December 20, 1950 (1951 P-H, par. 72,371). Cf. *Surface Combustion Co.* v. *United States*, *supra*.

under the provisions of Section 722 (a), (b), and (c), was worked out between the taxpayer and the Government. The simple fact is that the plaintiff failed to pay the tax which the statute imposed and required, and that there was, in fact, a deficiency, which persisted until it was finally learned what relief the plaintiff was entitled to."

The majority opinion of the Court of Claims in the instant case held that the *Seeley* case is distinguishable upon the ground that in the net loss situation Section 122 of the Internal Revenue Code (which defines a net operating loss) is designed to become operable after some economic reversal in a future taxable period, while Section 722 is operable, if at all, from the time the return is filed.[8] Judge Madden in his dissenting opinion (R. 24-25), after referring to the "mandate of Section 722(d)" that the taxpayer shall file its return and pay the tax without the application of that section, stated that any difference between the instant case and cases like *Seeley Tube* and *Rodgers* v. *United States*, 108 F. Supp. 727 (C. Cl.) "is, as a practical matter, more apparent than real". After referring to the provisions of Sections 722 and 3771(g) of the Internal Revenue Code,[9] he concluded that

[8] But see *Standard Roofing & Material Co.* v. *United States*, 199 F. 2d 607, where the Court of Appeals for the Tenth Circuit held the *Seeley* case controlling and that the Government was entitled to retain interest collected on a deficiency later eliminated in part as the result of renegotiation proceeding, being of the opinion that the fact that two years were involved in the *Seeley* case and only one there was immaterial.

[9] Section 3771(g) restricts interest on overpayments resulting from the allowance of relief under Section 722. Parallel provisions in Section 3771(e) restricting interest on overpay-

these provisions "show the intention of Congress that the money is intended to be collected and held by the Government, as of right, until the question of Section 722 relief is settled." (R. 25.) The Court of Appeals for the Fifth Circuit in the *Premier Oil* case expressly stated its agreement with the dissenting opinion of Judge Madden in the present case.

3. The question is one of considerable and continuing importance in the administration of the federal tax law. Although the excess profits tax was repealed by the Revenue Act of 1945, c. 454, 59 Stat. 556, Section 122(a), effective for years beginning after December 31, 1945, there are still a large number of claims pending before the Internal Revenue Service, as well as suits filed in the Court of Claims and the District Courts, involving this issue.[10] The amount involved in suits already filed is approximately one and one-half million dollars. As already stated, an appeal has been filed with the Court of Appeals for the Sixth Circuit in the *Surface Combustion* case. The District Court for the Southern District of Florida in *Kader Citrus Pulp Co.* v. *United States*, decided March 16, 1953 (1953 P-H, par. 72,487), decided the identical issue in favor of the taxpayer. The

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ments resulting from net operating loss carry-backs were regarded as significant and persuasive by this Court in reaching its decision in the *Seeley* case. (Cf. *Seeley*, pp. 567-568.)

[10] Some of these claims and suits involve interest on assessed deficiencies. However, in view of the decisions in the cases of *Rodgers*; *Cumberland Portland Cement*; and *Surface Combustion*, *supra*, the question of whether the deficiency was actually assessed or not seems immaterial.

Government's motion for rehearing in that case is still pending. In addition, about four thousand claims are pending before the Excess Profits Tax Council and the Tax Court for allowance of relief under Section 722. The same question will, therefore, undoubtedly arise in the case of some of these taxpayers after their claims under Section 722 are finally determined.

CONCLUSION

For the reasons stated, it is submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

MARCH 1954.

APPENDIX

Internal Revenue Code:

SEC. 271. DEFINITION OF DEFICIENCY.

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(b) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

(26 U. S. C. 1946 ed., Sec. 271.)

SEC. 272. PROCEDURE IN GENERAL.

(a)(1) *Petition to Board of Tax Appeals.*— If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered

mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final.

* * * * *

(26 U. S. C. 1946 ed., Sec. 272.)

SEC. 292. INTEREST ON DEFICIENCIES.

Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier.

(26 U. S. C. 1946 ed., Sec. 292.)

SEC. 722 [as added by Sec. 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, and amended by Sec. 222(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and the Act of December 17, 1943, c. 346, 57 Stat. 601]. GENERAL RELIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

(a) *General Rule.*—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. In determining such constructive average base period net income, no regard shall be had to events or conditions affecting the taxpayer, the industry of which it is a member, or taxpayers generally occurring or existing after December 31, 1939, except that, in the cases described in the last sentence of section 722(b)(4) and in section 722(c), regard shall be had to the change in the character of the business under section 722(b)(4) or the nature of the taxpayer and the character

of its business under section 722(c) to the extent necessary to establish the normal earnings to be used as the constructive average base period net income.

(b) *Taxpayers Using Average Earnings Method.*—The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713, if its average base period net income is an inadequate standard of normal earnings because—

(1) in one or more taxable years in the base period normal production, output, or operation was interrupted or diminished because of the occurrence, either immediately prior to, or during the base period, of events unusual and peculiar in the experience of such taxpayer,

(2) The business of the taxpayer was depressed in the base period because of temporary economic circumstances unusual in the case of such taxpayer or because of the fact that an industry of which such taxpayer was a member was depressed by reason of temporary economic events unusual in the case of such industry,

(3) the business of the taxpayer was depressed in the base period by reason of conditions generally prevailing in an industry of which the taxpayer was a member, subjecting such taxpayer to

(A) a profits cycle differing materially in length and amplitude from the general business cycle, or

(B) sporadic and intermittent periods of high production and profits, and such periods are inadequately represented in the base period,

(4) the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business. If the business of the taxpayer did not reach, by the end of the base period, the earning level which it would have reached if the taxpayer had commenced business or made the change in the character of the business two years before it did so, it shall be deemed to have commenced the business or made the change at such earlier time. For the purposes of this subparagraph, the term "change in the character of the business" includes a change in the operation or management of the business, a difference in the products or services furnished, a difference in the capacity for production or operation, a difference in the ratio of nonborrowed capital to total capital, and the acquisition before January 1, 1940, of all or part of the assets of a competitor, with the result that the competition of such competitor was eliminated or diminished. Any change in the capacity for production or operation of

the business consummated during any taxable year ending after December 31, 1939, as a result of a course of action to which the taxpayer was committed prior to January 1, 1940, or any acquisition before May 31, 1941, from a competitor engaged in the dissemination of information through the public press, of substantially all the assets of such competitor employed in such business with the result that competition between the taxpayer and the competitor existing before January 1, 1940, was eliminated, shall be deemed to be a change on December 31, 1939, in the character of the business, or

(5) of any other factor affecting the taxpayer's business which may reasonably be considered as resulting in an inadequate standard of normal earnings during the base period and the application of this section to the taxpayer would not be inconsistent with the principles underlying the provisions of this subsection, and with the conditions and limitations enumerated therein.

(c) *Invested Capital Corporations, Etc.*— The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer, not entitled to use the excess profits credit based on income pursuant to section 713, if the excess profits credit based on invested capital is an inadequate standard for determining excess profits, because—

(1) the business of the taxpayer is of a

class in which intangible assets not includible in invested capital under section 718 make important contributions to income,

(2) the business of the taxpayer is of a class in which capital is not an important income-producing factor, or

(3) the invested capital of the taxpayer is abnormally low.

In such case for the purposes of this subchapter, such taxpayer shall be considered to be entitled to use the excess profits credit based on income, using the constructive average base period net income determined under subsection (a). For the purposes of section 713(g) and section 743, the beginning of the taxpayer's first taxable year under this subchapter shall be considered to be that date after which capital additions and capital reductions were not taken into account for the purposes of this subsection.

(d) *Application for Relief Under This Section.*—The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710(a)(5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to the amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has

been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose of determining the tax under this subchapter for a subsequent taxable year.

* * * * *

(26 U.S.C. 1946 ed., Sec. 722.)

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No. 29

In the Supreme Court of the United States

OCTOBER TERM, 1954

THE UNITED STATES, PETITIONER

v.

KOPPERS COMPANY, INC., SUCCESSOR ON MERGER TO KOPPERS UNITED COMPANY AND SUBSIDIARIES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 14–25) is reported at 117 F. Supp. 181.

JURISDICTION

The judgment of the Court of Claims was entered December 1, 1953. (R. 14, 24, 29.) The petition for a writ of certiorari was filed March 1, 1954, and was granted May 17, 1954. (R. 41.) The jurisdiction of this Court rests on 28 U. S. C., Section 1255 (1).

QUESTION PRESENTED

Whether interest is payable on the full amount of deficiencies in excess profits taxes, from the time the returns were due and the taxes were payable, where portions of the deficiencies were subsequently extinguished by reason of the granting of applications for relief under Section 722 of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutory provisions (Sections 52, 53, 56, 271, 272, 292, 294, 710, 722, 728, 729, and 3771 of the Internal Revenue Code) and Treasury Regulations (Treasury Regulations 109, Section 30.722–5) are set forth in the Appendix, *infra*, pp. 34–47.

STATEMENT

The facts, which are undisputed, are set forth in the findings entered by the Court of Claims (R. 25–29) and may be summarized as follows:

The taxpayer corporation[1] filed tax returns for 1940 and 1941 (the taxable years) in which it reported an excess profits tax liability of $6,512.76 for 1940, and $1,781,288.14 for 1941, and it paid these amounts in installments (R. 25–26). On September 15, 1943, it filed applications under

[1] Koppers Company, Inc., is the successor by a 1944 merger of Koppers United Company and its subsidaries, which filed consolidated excess profits tax returns for the taxable years (R. 25–26). For convenience both the Koppers Company and its predecessor are referred to as the taxpayer.

Section 722, a provision authorizing relief to a taxpayer which establishes that in the particular circumstances the computation of the tax has resulted in an "excessive and discriminatory" levy. Amended applications for relief were filed in 1945. On December 16, 1950, the taxpayer executed an "Agreement to Amount of Constructive Average Base Period Net Income Determined Under Section 722" for the taxable years, which amounts were approved by the Excess Profits Tax Council of the Internal Revenue Service (then called the Internal Revenue Bureau) on January 10, 1951 (R. 26).

At various times beginning in 1946 the Internal Revenue Agent in Charge transmitted to taxpayer copies of Revenue Agents' reports covering examination of its excess profits tax returns for the taxable years. The final transmittal letter, dated February 9, 1951, reflected an agreement which had been reached between taxpayer and the Internal Revenue Service with respect to the amount of taxpayer's excess profits tax liability both before and after the allowance of Section 722 relief. The computations agreed upon showed deficiencies in excess profits tax payments, before application of Section 722, of $460,408.91 for 1940 and $426,730.95 for 1941; and residual deficiencies, after application of Section 722, of $260,554.39 for 1940 and $95,749.33 for 1941. These computations were made by the Commissioner in accordance with the administrative prac-

tice of first determining the excess profits tax liability without the allowance of any relief provided by Section 722, and then giving effect to the relief allowed under that section. On February 14, 1951, the taxpayer filed a waiver consenting to the assessment and collection of the net deficiencies remaining after the application of Section 722. On March 8, 1951, the Commissioner issued a statutory notice of deficiencies in those amounts (R. 26–28).

On April 17, 1951, pursuant to the waiver filed February 14, 1951, the Commissioner assessed deficiencies in excess profits taxes in the net amounts remaining after giving effect to the allowance of Section 722 relief. At the same time, the Commissioner assessed interest of $217,376.07 for 1940 and $230,504.86 for 1941. The interest for 1940 was computed upon the sum of $460,-408.91 (the original deficiency before allowance of Section 722 relief), and for the period beginning March 15, 1941 (the due date of the 1940 return), to January 28, 1949 (which was treated as the date of payment of the net deficiency after allowance of Section 722 relief). The interest for 1941 was computed upon the sum of $426,-730.95 (the original deficiency before allowance of Section 722 relief), and for the period March 15, 1942 (the due date of the 1941 return), to March 16, 1951 (which was thirty days after the filing of the waiver of February 14, 1951) (R. 28–29).

The taxpayer paid the amounts of the deficiencies and interest assessed, and then filed claims for refund of $94,358.71 of the interest paid for 1940 and $178,784.48 of the interest paid for 1941. The amounts claimed represent interest due on those portions of the original deficiencies which were abated by reason of the subsequent allowance of Section 722 relief (R. 29). Following rejection of the claims, this suit for refund was timely instituted in the Court of Claims (R. 1–7).

The Court of Claims entered judgment for the taxpayer in the amounts claimed (less a conceded set-off of a minor amount), together with interest (R. 29).

SUMMARY OF ARGUMENT

In holding that interest was owing by taxpayer only on the amounts of the excess profits tax deficiencies remaining after the granting of its application for relief under Section 722 of the Internal Revenue Code, rather than on the full amounts of the deficiencies existing when the returns were due and the taxes were payable, the court below disregarded the controlling statutory provisions and departed from the principles established by this Court's decision in *Manning* v. *Seeley Tube & Box Co.*, 338 U. S. 561. The decision below places a premium upon failure to pay the correct amount of tax on the return date by permitting delinquent taxpayers to retain,

interest-free, monies which rightfully should have been paid to and held by the United States.

Taxpayer was obliged under the taxing statute (Code Secs. 53 (a) and 56 (a)) to return and pay the total amount of its 1940 and 1941 taxes by March 15 of 1941 and 1942, respectively. It erroneously computed the tax for each year, as the result of which it admittedly reported and paid substantially less than the taxes then due. The difference between the correct tax and the amount paid on the return date constituted a "deficiency" (Sec. 271), and interest on each deficiency was payable from the time the tax was payable (Sec. 292). The deficiencies were not "potential," as the majority of the court below characterized them. They arose in fact when the taxpayer failed to pay the full amounts due on the respective return dates. They actually continued in existence until extinguished by the subsequent allowance of Section 722 relief. By paying less than the full amount of taxes due, when they were due, taxpayer deprived the Government of the use of the funds for the intervening period, and it must therefore compensate the Government, by payment of interest as required by the statute, for the loss of that use.

Nothing in Code Section 722 or its history warrants the view, on which the decision below rests, that taxpayer was retroactively relieved of the duty to report and pay the correct amount of 1940 and 1941 taxes immediately when due,

merely because it subsequently applied for and was granted (in 1951) tax relief under Section 722. On the contrary, it is apparent from the provisions of Section 722 as a whole (and of subsection (d) in particular), from the legislative history of that Section and from related statutory provisions, that the extinguishment of a deficiency (or a portion thereof) by reason of an allowance of Section 722 relief does not operate retroactively to excuse the taxpayer, *ab initio,* from reporting and paying the correct tax on the due date.

Section 722 (d) expressly commands the taxpayer to compute and pay the tax on the return date without the benefit of any claimed relief under that section, and it affords the taxpayer a period of time thereafter within which to apply for such relief. Moreover, subsection (a) requires the corporation seeking relief to meet certain conditions: It must show that the tax previously computed and paid was excessive and discriminatory, and it must establish a "fair and just" constructive average base period net income to be used in redetermining the tax. These provisions, and the implementing Treasury Regulations, make it clear that Section 722 was not designed to alter the taxpayer's duty to pay the correct tax on the return date. And they completely refute the assumption, implicit in the decision below, that a taxpayer may withhold from the Government, interest-free, a portion of the

tax payable on the return date in the hope of later obtaining an equivalent amount of tax reduction under Section 722. Had Congress intended to permit deferment of payment of taxes pending the determination of whether (and the extent to which) an application for relief under Section 722 was allowable, it could readily have said so; in fact, however, it unequivocally said the opposite.

The only exception to the congressional mandate that the taxpayer must compute and pay the tax in full on the return date without the benefit of any claimed Section 722 relief is the one specifically carved out in Section 722 (d), namely, a situation covered by Section 710 (a)(5), and admittedly taxpayer does not fall within the exception. Under the construction of Section 722 adopted by the court below, the exception becomes superfluous.

That Congress never intended to authorize the withholding of part of the tax due on the return date, merely because some Section 722 relief might later be allowed, is confirmed by Code Section 3771 (g). Under that Section, as it applies to the taxable years here involved, a corporation which correctly stated its excess profit taxes and paid them when they were due could not obtain interest on any amount refunded by the Government as the result of the subsequent allowance of Section 722 relief. To hold that a corporation

which underpays the tax on the return date may retain the use of the money interest-free for the intervening period, while one which pays the lawful tax promptly is precluded both from having the use of the money and receiving interest from the Government for its use, is to attribute to Congress an intention—nowhere suggested in the statute or its history—to accord more favorable treatment to delinquent taxpayers than to those who comply with the law.

Such a result, moreover, is irreconcilable with this Court's decision in the *Seeley* case. While that case involved the complete cancellation of a deficiency by virtue of a net operating loss carryback adjustment, and this one a partial cancellation of a deficiency by virtue of relief adjustment under Section 722, the rationale of *Seeley* applies here with full force.

ARGUMENT

HAVING UNDERPAID ITS 1940 AND 1941 EXCESS PROFITS TAXES WHEN THE RETURNS WERE DUE ON MARCH 15 OF THE SUCCEEDING YEARS, TAXPAYER IS NOT ENTITLED TO A REFUND OF INTEREST PAID ON THE DEFICIENCIES MERELY BECAUSE PORTIONS OF THE DEFICIENCIES WERE LATER CANCELLED UPON THE ALLOWANCE OF RELIEF UNDER SECTION 722 OF THE INTERNAL REVENUE CODE

There is no dispute that in its tax returns for 1940 and 1941 (the taxable years), taxpayer understated its excess profits tax liability and to that

extent underpaid the taxes which should have been reported and paid on March 15th of the succeeding years.[2] By applications filed in September 1943, and amended in 1945, it sought relief, pursuant to Section 722 (d) of the Internal Revenue Code (Appendix, *infra*, pp. 43–44), in respect of its liability for each of the taxable years. Relief was ultimately granted in 1951 on the basis of a 1950 agreement reached between taxpayer and the Commissioner as to the amount of constructive average base period net income under Section 722. Notwithstanding the grant of this relief, substantial deficiencies remained. After final audit, the Commissioner computed and determined the excess profits tax deficiencies both before and after applying Section 722 relief. In March 1951, he issued a statutory notice of deficiencies in the net amounts remaining after the allowance of Section 722 relief. In April 1951, the Commissioner duly assessed deficiencies in these net amounts, and at the same time assessed interest on the original deficiencies (before allowance of Section 722 relief) from the

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[2] The underpayments are attributable to uncontested non-Section 722 adjustments in taxpayer's excess profits tax returns (*i. e.*, adjustments other than those arising from the later allowance of relief under Code Section 722), and the parties are in agreement as to the amounts of the underpayments (Finding 9, R. 27–28). See also affidavit of McLaughlin, R. 31–35, and Exhibits I and J, attached thereto (R. 36A–38A).

time the 1940 and 1941 returns were due.[3] Taxpayer paid the deficiencies and interest assessed, but claimed a refund to the extent that the Commissioner assessed interest on those portions of the deficiencies which were subsequently abated by reason of the allowance of relief under Section 722.

Sustaining the taxpayer's position, the Court of Claims held in substance that taxpayer's obligation to report and pay the correct amount of tax on the pertinent return dates was retroactively expunged, *pro tanto,* by virtue of the subsequent filing and granting of applications for relief pursuant to Section 722.

The narrow issue thus framed is essentially the same issue as was presented in *Manning* v. *Seeley Tube & Box Co.,* 338 U. S. 561. Holding in that case that interest was payable on a deficiency from the time the return was due, despite later cancellation of the deficiency by operation of the "carry-back" provisions of the Code, this Court stated (p. 566): "In the absence of a clear legislative expression to the contrary, the question of who properly should possess the right of use of the money owed the Government for the period it is owed must be answered in favor of the Government."

We shall urge that the statutory provisions

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[3] The commencement and terminal dates of the period for computing the interest are not in issue (Finding 11, R. 28). The controversy relates solely to whether the interest is to be computed on the entire amounts of the deficiencies or only on the amounts remaining after the Section 722 adjustment.

before the Court in the instant case, far from expressing an intent that the allowance of Section 722 relief shall absolve the taxpayer from the duty to pay interest on a pre-existing deficiency, point conclusively the other way. If this analysis is correct, it follows that there is no basis for the Court of Claims' departure from the principles enunciated by this Court in *Seeley,* and that the decision of the Court of Appeals for the Fifth Circuit in the *Premier Oil* case (No. 41, to be argued with this case), applying the *Seeley* doctrine to a factual situation indistinguishable from the one presented here, represents the correct view.

A. TAXPAYER WAS OBLIGED TO COMPUTE AND PAY THE CORRECT AMOUNT OF ITS 1940 AND 1941 TAXES BY MARCH 15 OF THE FOLLOWING YEARS, AND TO PAY INTEREST ON THE DEFICIENCIES FROM THOSE DATES

Since taxpayer reported its taxes on a calendar year basis (R. 25), it was required to file its returns for 1940 and 1941 on or before March 15 of the succeeding years. Internal Revenue Code, Secs. 52 (a) and 53 (a). (Appendix, *infra,* p. 34.) It was required to compute and pay, by those same dates, "The total amount of tax imposed" on its net income. (Sec. 56 (a), Appendix, *infra,* pp. 34–35.)[4] The statutory require-

[4] The 1940 and 1941 excess profits taxes were paid by the taxpayer in installments as permitted by Section 56 (b). Interest on the deficiencies (computed without the Section

ments relating to returns and payment of income tax apply also to the excess profits tax. Secs. 728, 729 (Appendix, *infra*, p. 44).

Section 271 (a) (Appendix, *infra*, p. 35) defines a "deficiency" in tax as "The amount by which the tax imposed * * * exceeds the amount shown as the tax by the taxpayer upon his return." In this case the taxpayer filed its returns for 1940 and 1941, and paid the taxes shown to be due thereon,[5] but the returns failed to show the correct amounts of excess profits taxes then due. As a consequence, the taxpayer paid substantially less than the amounts it should have paid on March 15 of 1941 and 1942, respectively, and the Commissioner determined deficiencies (both before and after application of Section 722 relief) in amounts which are not in dispute (R. 27–28, 33–34).

Code Section 292 (Appendix, *infra*, p. 37) provides that "Interest upon the amount determined as a deficiency * * * be paid * * * at the rate of 6 per centum per annum *from the date prescribed for the payment of the tax*" (italics ours), and that it shall be assessable at the same

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722 relief) for these years, which is the nub of the controversy, runs from the dates when the first installments were due, i. e., March 15, 1941 and 1942 (Code Sec. 292). For purposes of simplicity, in discussing the due date for the payment of taxes, the brief will disregard the provision for installment payments.

[5] The returns were filed after March 15 of the following years (R. 25), but their timeliness is not in question.

time as the deficiency.[6] Since the taxpayer understated, and underpaid, its taxes on the date prescribed for payment, the Commissioner properly assessed interest on the entire amounts of the deficiencies at the same time that he assessed the net amounts of the deficiencies remaining after the allowance of Section 722 relief (R. 28–29).

In characterizing the portions of the deficiencies which were subsequently cancelled by the Section 722 adjustment as "potential" deficiencies which taxpayer was "never required to pay" (R. 14–15, 23), the court below failed to heed the statutory provisions for prompt and full payment of taxes on a specified date. As this Court stated in the *Seeley* case (pp. 565–566):

> The general statutory scheme which presents the problem is as follows: As of a certain date the taxpayer has a duty to file a return for the previous fiscal year and pay the amount of the tax actually due for that year. If this return is erroneously

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[6] Where the taxpayer reports the correct amount of tax, but fails to pay the amount reported, interest is likewise payable from the date prescribed for payment. Sec. 294 (a). Even where extensions of time for payment of the tax are granted, interest is payable. Secs. 56 (c), 295, 296. Interest also runs on unpaid interest. Sec. 294 (b). The court below erroneously assumed (R. 22–23) that the only sanctions imposed for failure to make timely payment of the correct tax, where Section 722 relief is later allowed, are the "penalty" provisions of the Code (Secs. 291, 293), prescribing additions to the tax for negligence or fraud. As was noted in the *Seeley* case (p. 566), the interest and penalty provisions are separate.

> calculated and the payment is less than the tax properly due, the Commissioner, using the procedure appropriate to the particular situation, may assess a deficiency, the difference between the tax imposed by law and the tax shown upon the return. Interest upon this deficiency at the rate of six per cent from the date the tax was lawfully due to the date of the assessment is assessed at the same time as the deficiency. * * *
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> We hold that the interest was properly withheld by the Collector. The subsequent cancellation of the duty to pay this assessed deficiency does not cancel in like manner the duty to pay the interest on that deficiency. From the date the original return was to be filed until the date the deficiency was actually assessed, the taxpayer had a positive obligation to the United States: a duty to pay its tax. * * * For that period the taxpayer, by its failure to pay the taxes owed, had the use of funds which rightfully should have been in the possession of the United States. The fact that the statute permits the taxpayer subsequently to avoid the payment of that debt in no way indicates that the taxpayer is to derive the benefits of the funds for the intervening period. * * *

The deficiencies on which the interest here in controversy was assessed may no more be considered "potential," simply because they were later partially cancelled, than were the com-

pletely cancelled deficiencies involved in the *Seeley case*. See also, *Babcock & Wilcox Co.* v. *Pedrick*, 212 F. 2d 645, 647–650 (C. A. 2d), petition for certiorari filed July 3, 1954, No. 190. The taxpayer having failed to pay the correct amount of taxes when payment was due, the deficiencies actually came into being at that time, and they remained real deficiencies even though they were later extinguished in part.[7] By paying less than the amounts due, the taxpayer deprived the Government of the use of the money for the intervening period, and the manifest purpose of the interest provision of the taxing statute is to compensate the Government for the loss of that use. In the words of this Court in *Seeley* (p. 566), "For that period the taxpayer, by its failure to pay the taxes owed, had the use of funds which rightfully should have been in the possession of the United States."

B. THE SUBSEQUENT CANCELLATION OF PORTIONS OF THE DEFICIENCIES, BY REASON OF THE GRANTING OF AN APPLICATION FOR RELIEF UNDER CODE SECTION 722, DID NOT RETROACTIVELY RELIEVE TAXPAYER OF THE DUTY TO MAKE TIMELY PAYMENT OF ITS TAXES

The decision below rests on the proposition (R. 19–20) that Code Section 722 was intended to operate retroactively, to the extent of any relief

[7] As the dissenting opinion below observed (R. 24), "The simple fact is that the plaintiff failed to pay the tax which the statute imposed and required, and that there was, in fact, a deficiency, which persisted until it was finally learned what relief the plaintiff was entitled to."

ultimately granted under that section, in determining excess profits tax liability. Thus the majority of the court below attempted (R. 21–22) to distinguish this case from *Seeley* on the ground that "Section 122 [the carryback provision there involved] is designed to become operable after some economic reversal in a future taxable period, while Section 722 is operable, if at all, from the time the return is filed."[8] Proceeding on this theory, it concluded that the relief granted to taxpayer here in 1951 served to excuse it, *ab initio,* from making full and timely payment of its 1940 and 1941 taxes when the returns for those years were due.

Nothing in Section 722 or its history, however, justifies this interpretation. On the contrary, it is apparent from the section as a whole, and from subsection (d) in particular, to say nothing of related provisions of the Code, that there was no intention to derogate from the statutory scheme for the prompt and full payment of the tax for any taxable year on the date the return for that year is due. Under the construction adopted by

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[8] Emphasizing the use of such words as "determined" and "in lieu of" in Section 722 (a) (R. 19), the court agreed (R. 22) with the construction placed upon Section 722 by the District Court in *Kuder Citrus Pulp Co.* v. *United States*, 117 F. Supp. 395 (S. D. Fla.), where it was stated (p. 399) that the section "does not forbid retroactive application of the relief when determined by the Commissioner." An appeal from this decision is pending in the Court of Appeals for the Fifth Circuit.

the court below, any corporation subject to excess profits tax would be invited to hazard a guess, on the date its return was due, whether and to what extent an application for relief under Section 722 might later be granted. What is more, it would be authorized to withhold from the tax payable on that date, interest-free, such amount as might finally be allowed as relief under that section. Such an interpretation is not only repugnant to the statutory pattern for the payment of taxes by a certain date; it also ascribes to Congress an intention to discriminate against corporations which pay the correct amount of tax on the due date by rewarding those which gamble on the prospects of a future allowance of Section 722 relief.

To place the relief aspects of Section 722 in their statutory context, we refer briefly to the provisions establishing an excess profits tax for the taxable years here involved.[9] The tax, it will be noted, is imposed on the adjusted excess profits net income (Code Sec. 710 (a) and (b)). The most important adjustment factor is the excess profits credit, which may be determined in either of two ways—under the income method (Sec. 713)

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[9] Subchapter E of Chapter 2 of the Internal Revenue Code, constituting the "Excess Profits Tax Act" of 1940, and more commonly known as the World War II Excess Profits Tax law, was added to the Code by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974. The tax was repealed by Sec. 122 (a) of the Revenue Act of 1945, c. 453, 59 Stat. 556, effective for taxable years beginning after 1945.

or the invested capital method (Sec. 714). Under the income method, the credit is a specified percentage of the "average base period net income," i. e., the average annual income of a prior four-year period (1936–1939, inclusive).

Section 722 affords relief in cases where use of the average base period net income or the statutory invested capital "results in an excessive and discriminatory tax * * *" (subsection (a)). It provides that if the taxpayer "establishes" (1) that the tax computed "without the benefit of this section" is excessive, and (2) "what would be a fair and just amount representing normal earnings" for the base period, then "the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income" otherwise determined (*Ibid.*).

Subsection (d) of Section 722, entitled "*Application for Relief Under this Section,*" states:

> *The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section,* except as provided in section 710 (a) (5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. * * * [Italics ours.]

This subsection (which was enacted in substantially its present form by Section 6 of the Excess Profits Tax Amendments of 1941[10]) was explained in the House and Senate Committee Reports as follows:[11]

> The taxpayer must first compute and pay his tax without regard to this relief provision and then must petition the Commissioner for relief by way of claim for refund.
>
> Your committee feel that so safeguarded and restricted this relief provision, though broad and general in nature, will satisfactorily alleviate hardships due to abnormal conditions in the base period, and at the same time prevent abuses.
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> * * * * *
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> It is deemed advisable in the interests of good administration, in view of the nature of the problem presented by section 722, that the taxpayer should not be permitted to apply the section in the computation of the excess-profits tax liability shown upon its return and that the tax-

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[10] c. 10, 55 Stat. 17. The provisions first appeared as subsection (e) of Section 722. The exception relating to Code Section 710 (a) (5) was added by Section 222 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798. Amendments enacted by Section 1 of the Act of December 17, 1943, c. 346, 57 Stat. 601, extended the time for filing applications for relief.

[11] H. Rep. No. 146, 77th Cong., 1st Sess., pp. 4, 13 (1941–1 Cum. Bull. 550, 552, 559); S. Rep. No. 75, 77th Cong., 1st Sess., pp. 4, 13 (1941–1 Cum. Bull. 564, 565).

> payer should be required to conform to reasonable restrictions with respect to the time within which it may make application for the benefits of the section. Accordingly, under the provisions of subsection (d) a taxpayer is not permitted to claim the benefits of section 722 in computing its tax upon the return. A taxpayer, in order to obtain the benefits of section 722, must make an application to the Commissioner of Internal Revenue under regulations to be prescribed by the Commissioner with the approval of the Secretary of the Treasury.

It is thus plain from the language of Section 722 (d) and its legislative history that a taxpayer must file its excess profits tax return, and compute and pay the tax, without the benefit of any anticipated Section 722 relief. Indeed, the congressional intent to require computation and full payment of the tax when the return is due, without the application of Section 722, could hardly have been expressed in more unequivocal terms.

Furthermore, and quite apart from the mandate of subsection (d) of Section 722, it is evident from the provisions of subsections (a), (b) and (c) that a taxpayer is not automatically entitled to relief under that section as of the time the return is due. As a condition precedent to obtaining relief, it must "establish" the right to use a "constructive" average base period net income in lieu of the average base period net income otherwise determined—a time-consuming

process entailing proof and evaluation of a variety of complex accounting and economic factors. The applicant also has the burden of establishing the amount of relief to which it may be entitled. As the dissenting opinion below states (R. 25), "it is plain that it will take much study and analysis and the exercise of much judgment to make the final determination as to the amount of relief to be granted the taxpayer." The course of this very case (see Statement, *supra*, pp. 2–5) illustrates the soundness of this observation.

Congress recognized that there might be situations in which it would be inequitable to require full payment of the tax in advance of relief determinations under Section 722. Accordingly, Section 710 (a) (5) (Appendix, *infra*, pp. 38–39) was added to the Code by the Revenue Act of 1942,[12] to provide that if the adjusted excess profits tax net income (computed without reference to Section 722) exceeded 50 percent of the normal tax net income, and if the taxpayer claimed Section 722 relief in its return, there could be a deferment of payment to the extent of 33 percent of the reduction in tax claimed.[13]

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[12] Section 222 (b) of the Revenue Act of 1942, *supra*, effective under Section 201 for taxable years beginning after 1941.

[13] Even where the taxpayer qualifies for the privilege of deferred payment under Section 710 (a) (5), interest is payable from the return date on any excess of the amount deferred over the the amount of relief finally granted. *Squire* v. *Puget Sound Pulp & Timber Co.*, 181 F. 2d 745 (C. A. 9th); *Jones* v. *Johnson*, 176 F. 2d 693 (C. A. 10th).

The legislative history of this section confirms the Congressional intent to require immediate payment of the full tax on the return date, without the benefit of any claimed relief, in all other cases. Thus the Senate Finance Committee Report accompanying the 1942 Act stated: [14]

> Although it is believed advisable to require a taxpayer seeking relief under section 722 to compute and pay its tax without the benefit of such section, there are some cases in which it would be inequitable to compel the taxpayer to pay the entire amount of such tax. Section 710 (a) is therefore amended to provide that if the adjusted excess profits net income (computed without the benefit of sec. 722) for any taxable year in which the taxpayer claims relief under such section is in excess of 50 percent of the normal tax net income for such year (computed without the credit for adjusted excess profits net income) the amount of the tax payable at the time required for payment may be reduced by an amount equal to 33 percent of the reduction claimed in the tax.

The only exception to the mandate in Section 722 (d) that the tax be initially computed and paid without the benefit of Section 722 is the one there specifically carved out in favor of taxpayers who meet the conditions of Section 710 (a) (5). No claim is or can be made by taxpayer here that

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[14] S. Rep. No. 1631, 77th Cong., 2d Sess., p. 205 (1942-2 Cum. Bull. 504, 654-655).

it comes within the exception.[15] Had Congress intended to permit deferment of payment of the tax in all cases pending determination of an application for relief under Section 722, it could readily have said so.[16] Instead, in Section 710 (a) (5) it specified a limited exception. Under the construction of Section 722 adopted by the court below, the exception provision becomes superfluous.

In harmony with the above statutory provisions and their background, Section 30.722–5 of Treasury Regulations 109 (Appendix, *infra*, pp. 45–47), provides that, except as authorized by Code Section 710 (a) (5) and the Regulations,

> the taxpayer is not permitted to claim the benefits of section 722 in computing its excess profits tax on its return, but must compute its excess profits tax, file its excess

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[15] Section 722 (d) also provides that if a constructive average base period net income has already been determined for one taxable year, the Commissioner may by Regulations prescribe the extent to which its requirements may be waived for a future year. See also Section 30.722–5 (d), Treasury Regulations 109, as amended by T. D. 5393, 1944 Cum. Bull. 415. No such situation is here presented.

[16] Thus, the relief provisions of the Excess Profits Tax Act of 1950, c. 1199, 64 Stat. 1137 (adding Code Secs. 430–472), enacted as a result of the Korean conflict, established formulas for automatically determining a substitute average base period net income (Code Secs. 442–446), and permitted the taxpayer to adjust its base period net income at the time the return was filed (Code Sec. 447 (e)). See S. Rep. No. 2679, 81st Cong., 2d Sess., pp. 17–21 (1951–1 Cum. Bull. 240, 251–254).

> profits tax return, and pay the tax thus shown on such return without regard to the provisions of section 722.

The Regulations also prescribe the form, time, and manner in which an application for relief under Section 722 is to be filed. And in keeping with the rule laid down in Section 722 (a) that the relief is allowable only if the taxpayer "establishes" its right thereto, the Regulations provide that the taxpayer has the burden of substantiating its claim to relief by clear and convincing evidence. Even if the statutory provisions requiring payment of the full tax on the return date could be said to be ambiguous, the contemporaneous construction embodied in the Commissioner's Regulations would be entitled to great weight in ascertaining their meaning. *Lykes* v. *United States,* 343 U. S. 118, 127; *Commissioner* v. *South Texas Co.,* 333 U. S. 496, 501.

The requirement of Section 292 that interest be paid on a "deficiency" (defined in Section 271 as the difference between the tax imposed and the tax shown on the return) must, of course, be read in conjunction with Section 294 (a) (Appendix, *infra,* p. 37), which requires payment of interest on the amount of tax shown on the return but not paid. Had taxpayer reported the correct amount of tax in its return, but failed to pay the amount reported because of anticipated Section 722 relief, interest on the unpaid portion unquestionably would be col-

lectible under Section 294 (a). No reason appears why its failure to report the correct amount of tax in the first instance should produce a different result, and it is inconceivable that Congress intended one. In the one case, as in the other, the taxpayer has had the use of the funds which should have been paid to the United States, and that is the essence of the obligation to pay interest. *Manning* v. *Seeley Tube & Box Co., supra,* p. 565. See also *Rodgers* v. *United States,* 332 U. S. 371, 374; *Billings* v. *United States,* 232 U. S. 261, 285–287.

If more were needed to demonstrate that Congress intended the Government to have the full amount of the tax from the time the return was due, without regard to the possibility of Section 722 relief, it is furnished by Code Section 3771 (g). That section, as applicable to the taxable years 1940 and 1941 involved in this case, precludes a taxpayer which paid the correct tax on time from receiving interest from the Government on the overpayment resulting from a subsequent allowance of Section 722 relief.[17] Parallel

[17] Section 3771 (g) was added to the Code by the Act of December 17, 1943, *supra.* For tax years subsequent to 1942, interest on such an overpayment was not to be paid for any period prior to one year after the filing of the application for relief or September 16, 1945, whichever was later.

The same Act added correlative Section 292 (b), containing parallel provisions regarding the payment of interest on a deficiency attributable to the granting of Section 722 relief. Section 292 (b) was addressed to an increase in

provisions in Section 3771 (e), restricting interest on overpayments resulting from net operating loss carrybacks, were deemed persuasive by this Court in the *Seeley* case (pp. 567–68). To hold that a corporation which failed to make timely payment of the tax might retain the use of the funds, interest-free, for the period intervening between the return date and the allowance of Section 722 relief, while one which did make timely payment was prohibited from receiving interest from the Government upon a refund of the overpayment, would, as stated in *Seeley* (p. 568), "place a premium on failure to conform diligently with the law".[18] Even if the statutory

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ordinary income tax which would automatically flow (by reason of a downward adjustment in the Section 26 (e) credit) from a reduction in excess profits tax. See 89 Cong. Record, Part 6, p. 8191 (1943); S. Rep. No. 508, 78th Cong., 1st Sess., p. 2.

[18] A simple illustration will serve to show the inequality of treatment that would result. Suppose that taxpayers A and B each have the same income and deductions for 1940, and that the correct tax for each, computed without the benefit of Section 722, is $1,000. On March 15, 1941, the return date, A correctly reports and pays $1,000, while B reports and pays only $700. Each taxpayer subsequently files an application for Section 722 relief, and the applications are eventually granted to the extent of allowing a $500 reduction in excess profits tax liability. As a result A is entitled to a refund of $500, while B's $300 deficiency is eliminated and it is entitled entitled to a $200 refund. Unless B is charged interest on the deficiency from the time the return was due, it will enjoy an advantage over A, which correctly reported its tax and is not entitled to interest on the overpayment. The Government had the right to re-

language and history were less than plain, the Court would attribute to Congress "a desire for equality among taxpayers * * * rather than the reverse." *Colgate Co.* v. *United States*, 320 U. S. 422, 425.

In sum, the statute shows clearly that Congress intended all taxpayers subject to excess profits tax liability to report and pay the full tax on the due date of the return, just as if Section 722 had not been enacted, except where deferment of payment of part of the tax is expressly permitted under Section 710 (a) (5). Since taxpayer here admittedly reported and paid less than the amounts of taxes which should have been reported and paid for the taxable years, and since it admittedly does not come within the exception, a deficiency existed with respect to each year and the Government was entitled to interest from the return dates. While the deficiencies were subsequently cancelled in part by reason of the filing and granting of applications for relief under Section 722, the crucial fact remains that the taxes were understated and underpaid when payment was due. As the dissenting opinion below states (R. 24), there is "no escape from the mandate of Section

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ceive $1,000 from both A and B on March 15, 1941, and the right to use that money interest-free until allowance of the relief. Under the decision below, B, which underpaid the tax by $300, would retain the use of that amount interest-free during the intervening period; while A, which overpaid the tax by $500 would have neither the use of that amount nor interest.

722 (d) * * *. If the plaintiff had done what the statute expressly requires, the Government would have had the money, the interest on which is here in question, until the amount of relief to which the plaintiff was entitled under the provisions of Section 722 (a), (b), and (c) was worked out between the taxpayer and the Government."

C. THE DECISION BELOW DEPARTS FROM THE PRINCIPLES ESTABLISHED BY THIS COURT'S DECISION IN MANNING V. SEELEY TUBE & BOX CO.

The problem here is basically no different from that which was resolved in the *Seeley* case. This Court there held that the elimination of deficiencies in income and excess profits taxes by application of the net operating loss carryback provisions of the taxing statute did not retroactively alter the taxpayer's duty to report and pay the correct amount of tax on the return date, and hence did not relieve the taxpayer of the obligation to pay interest on the deficiencies from that date. After pointing out that the statute imposes upon all taxpayers a duty to file returns and to compute and pay taxes as of a certain date, the Court stated (p. 566) that "the taxpayer, by its failure to pay the taxes owed, had the use of funds which rightfully should have been in the possession of the United States. The fact that the statute permits the taxpayer subsequently to avoid the payment of that debt in no way indi-

cates that the taxpayer is to derive the benefits of the funds for the intervening period."

The rationale of the *Seeley* decision applies with full force. Here, as there, the taxpayer was obligated to report and pay a certain amount of tax as of a certain date. And here, as there, the statute permitted the taxpayer, at a subsequent date, to avoid payment of that debt. The taxpayer's duty to pay interest on the debt may no more be regarded as having been discharged in this case than in that one. Indeed, the reasoning in *Seeley* applies *a fortiori* here. For it was there held that the taxpayer's obligation to pay the full tax on the return date remained unchanged notwithstanding the fact that the applicable statutory provisions (Secs. 122 (b) and 710 (c)) expressly permitted an automatic *"carry-back"* of an additional deduction to the taxable year involved.[19] Section 722 does not authorize an additional deduction, nor a "carry-back" adjustment of any kind; it merely provides for the future granting of special relief under specified conditions to be established by the taxpayer (in the form of an additional credit against the tax), and it explicitly demands computation and payment of the tax on the return date without the benefit of such relief.

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[19] The Court noted in *Seeley* (p. 567) that "for many purposes the carry-back is equivalent to a *de novo* determination of the tax," but nevertheless felt constrained to conclude that the carry-back provision "does not retroactively alter the duty of a taxpayer to pay his *full tax promptly*." [Italics ours.]

The majority of the court below viewed the *Seeley* decision as of "little assistance" here, on the assumption that an allowance of Section 722 relief is retroactively operable "from the time the return is filed" (R. 21–22). Yet the provisions of Section 722 are to be searched in vain for any support for that assumption, and subsection (d) flatly contradicts it. As the dissenting opinion below aptly observes (R. 24–25), the difference between this case and *Seeley* is as a practical matter "more apparent than real." The relief adjustment afforded by Section 722 no more comes into play *nunc pro tunc*, as of the time the return is due, than does the carry-back adjustment considered in *Seeley*. It is contingent upon future determinations as to whether relief is allowable at all and, if so, in what amount.[20] Under Section 722 (d) the application for relief may be filed in a taxable year subsequent to the year for which the relief is claimed, and subsequent even to the date on which the return is due. As pointed out above, no relief is allowable unless and until the taxpayer "establishes" the right to use a "constructive" average base period net income and the "fair and just amount" to be used. See also

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[20] The application for relief under Section 722 is treated as a "claim for refund", and if the Commissioner disallows the claim in whole or in part the Tax Court is given exclusive jurisdiction to review his determination. The decision of the Tax Court is not subject to further review. Code Section 732, as added by Section 9, Excess Profits Tax Amendments of 1941, *supra*.

Section 30.722–5 of Treasury Regulations 109. The vital consideration here, as in *Seeley*, is that the taxpayer was required on the return date to compute and pay the full tax—not an amount diminished by some anticipated or hoped-for adjustment of the tax—and that the Government may not be deprived of interest on any underpayment.[21]

We submit accordingly that the doctrine of the *Seeley* case is controlling and that the decision

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[21] In *Seeley* the deficiency was extinguished after it was formally assessed, while here the deficiencies were extinguished in part before they were assessed and only the unextinguished portions were assessed. The court below properly did not regard this as a material distinguishing feature, however, since the amounts of the deficiencies (both before and after the allowance of Section 722 relief) had been determined by the Commissioner and are not contested (R. 27–28, 33–38A). In *Rodgers* v. *United States*, 108 F. Supp. 727, the court below held that the Government could collect interest on a deficiency extinguished before its assessment. See also the decisions of the court below in *Henry River Mills Co.* v. *United States*, 96 F. Supp. 477, and *Linn Mills* v. *United States*, decided June 8, 1954 (1954 C. C. H., par. 9448). Nor has any significance been attached by other courts to non-assessment of extinguished deficiencies. See the decision of the Fifth Circuit Court of Appeals in the companion *Premier Oil* case (209 F. 2d 692); *Cumberland Portland Cement Co.* v. *United States*, 202 F. 2d 152 (C. A. 6th), affirming *per curiam*, 101 F. Supp. 577 (M. D. Tenn.); *De Soto Hardwood Flooring Co.* v. *United States* (W. D. Tenn.), decided December 20, 1950 (1951 P–H, par. 72,371). Cf. *Brandtjen & Kluge* v. *United States*, 78 F. Supp. 509 (D. Minn.); *Surface Combustion Corp.* v. *United States* (N. D. Ohio), decided November 25, 1953 (1953 P.–H, par. 72,804), pending on appeal to the Court of Appeals for the Sixth Circuit.

of the Court of Appeals in the companion case, *United States* v. *Premier Oil Co.*, No. 41, which is in direct conflict with the decision below, is correct.[22]

CONCLUSION

The judgment of the Court of Claims should be reversed.

Respectfully submitted.

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AUGUST 1954.

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[22] Compare *Cumberland Portland Cement Co.* v. *United States*, 202 F. 2d 152 (C. A. 6th), affirming *per curiam*, 101 F. Supp. 577 (M. D. Tenn.); *Standard Roofing & Material Co.* v. *United States*, 199 F. 2d 607 (C. A. 10th).

APPENDIX

Internal Revenue Code:

CHAPTER 1—INCOME TAX

* * * * *

SEC. 52. CORPORATION RETURNS.

(a) *Requirement.*—Every corporation subject to taxation under this chapter shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this chapter and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner with the approval of the Secretary may by regulations prescribe. * * *

* * * * *

(26 U. S. C. Sec. 52.)

SEC. 53. TIME AND PLACE FOR FILING RETURNS.

(a) *Time for Filing.*—

(1) *General rule.*—Returns made on the basis of the calendar year shall be made on or before the 15th day of March following the close of the calendar year. Returns made on the basis of a fiscal year shall be made on or before the 15th day of the third month following the close of the fiscal year.

* * * * *

(26 U. S. C. Sec. 53.)

SEC. 56. PAYMENT OF TAX.

(a) *Time of Payment.*—The total amount of tax imposed by this chapter

shall be paid on the fifteenth day of March following the close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on the fifteenth day of the third month following the close of the fiscal year.

(b) *Installment Payments.*—The taxpayer may elect to pay the tax in four equal installments, in which case the first installment shall be paid on the date prescribed for the payment of the tax by the taxpayer, the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the ninth month, after such date. If any installment is not paid on or before the date fixed for its payment, the whole amount of the tax unpaid shall be paid upon notice and demand from the collector.

* * * * *

(26 U. S. C. Sec. 56.)

SEC. 271. DEFINITION OF DEFICIENCY.

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(b) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the

amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.
(26 U. S. C. Sec. 271.)

SEC. 272. PROCEDURE IN GENERAL.

(a) (1) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. * * *

* * * * *

(d) *Waiver of Restrictions.*—The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on

the assessment and collection of the whole or any part of the deficiency.

* * * * *

(26 U. S. C. Sec. 272.)

SEC. 292. INTEREST ON DEFICIENCIES.

Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272 (d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier.

(26 U. S. C. Sec. 292.)

SEC. 294. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.

(a) *Tax Shown on Return.*

(1) *General rule.*—Where the amount, determined by the taxpayer as the tax imposed by this chapter, or any installment thereof, or any part of such amount or installment, is not paid on or before the date prescribed for its payment, there shall be collected as a part of the tax, interest upon such unpaid amount at the rate of 6 per centum per annum from the date prescribed for its payment until it is paid.

* * * * *

(b) *Deficiency.*—Where a deficiency, or any interest or additional amounts assessed in connection therewith under section 292, or under section 293, or any addition to the tax in case of delinquency provided for in

section 291, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid. If any part of a deficiency prorated to any unpaid installment under section 272 (i) is not paid in full on or before the date prescribed for the payment of such installment, there shall be collected as part of the tax interest upon the unpaid amount at the rate of 6 per centum per annum from such date until it is paid.

* * * * *

(26 U. S. C. Sec. 294.)

CHAPTER 2—ADDITIONAL INCOME TAXES

SUBCHAPTER E—EXCESS PROFITS TAX

* * * * *

SEC. 710 [As added by Sec. 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, and amended by Sec. 201 of the Revenue Act of 1941, c. 412, 55 Stat. 687]. IMPOSITION OF TAX.

(a) *Imposition.*—

(1) *General rule.*—There shall be levied, collected, and paid, for each taxable year, on the adjusted excess profits net income, as defined in subsection (b), of every corporation (except a corporation exempt under section 727) the tax shown in the following table:

* * * * *

[Added by Sec. 222 (b) of the Revenue Act of 1942, c. 619, 56 Stat. 798]

(5) *Deferment of payment in case of abnormality.*—If the adjusted excess profits

net income (computed without reference to section 722) for the taxable year of a taxpayer which claims on its return, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, the benefits of section 722, is in excess of 50 per centum of its normal tax net income for such year, computed without the credit provided in section 26 (e) (relating to adjusted excess profits net income), the amount of tax payable at the time prescribed for payment may be reduced by an amount equal to 33 per centum of the amount of the reduction in the tax so claimed. For the purposes of section 271, if the tax payable is the tax so reduced, the tax so reduced shall be considered the amount shown on the return.

* * * * *

(26 U. S. C. Sec. 710.)

SEC. 722 [As added by Sec. 201 of the Second Revenue Act of 1940, *supra,* and amended by Sec. 222 (a) of the Revenue Act of 1942, *supra,* and the Act of December 17, 1943, c. 346, 57 Stat. 601]. GENERAL RELIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

(a) *General Rule.*—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average

base period net income in lieu of the average base period net income otherwise determined under this subchapter. In determining such constructive average base period net income, no regard shall be had to events or conditions affecting the taxpayer, the industry of which it is a member, or taxpayers generally occurring or existing after December 31, 1939, except that, in the cases described in the last sentence of section 722 (b) (4) and in section 722 (c), regard shall be had to the change in the character of the business under section 722 (b) (4) or the nature of the taxpayer and the character of its business under section 722 (c) to the extent necessary to establish the normal earnings to be used as the constructive average base period net income.

(b) *Taxpayers Using Average Earnings Method.*—The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713, if its average base period net income is an inadequate standard of normal earnings because—

(1) in one or more taxable years in the base period normal production, output, or operation was interrupted or diminished because of the occurrence, either immediately prior to, or during the base period, of events unusual and peculiar in the experience of such taxpayer,

(2) the business of the taxpayer was depressed in the base period because of temporary economic circumstances unusual in the case of such taxpayer or because of the fact that an industry of which such tax-

payer was a member was depressed by reason of temporary economic events unusual in the case of such industry,

(3) the business of the taxpayer was depressed in the base period by reason of conditions generally prevailing in an industry of which the taxpayer was a member, subjecting such taxpayer to

(A) a profits cycle differing materially in length and amplitude from the general business cycle, or

(B) sporadic and intermittent periods of high production and profits, and such periods are inadequately represented in the base period,

(4) the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business. If the business of the taxpayer did not reach, by the end of the base period, the earning level which it would have reached if the taxpayer had commenced business or made the change in the character of the business two years before it did so, it shall be deemed to have commenced the business or made the change at such earlier time. For the purposes of this subparagraph, the term "change in the character of the business" includes a change in the operation or management of the business, a difference in the products or services furnished, a difference in the capacity for production or operation, a difference in the ratio of nonborrowed capital to total capital, and the acquisition before January 1, 1940, of all or part of the assets of a competitor, with the result that the competition of such competitor

was eliminated or diminished. Any change in the capacity for production or operation of the business consummated during any taxable year ending after December 31, 1939, as a result of a course of action to which the taxpayer was committed prior to January 1, 1940, or any acquisition before May 31, 1941, from a competitor engaged in the dissemination of information through the public press, or substantially all the assets of such competitor employed in such business with the result that competition between the taxpayer and the competitor existing before January 1, 1940, was eliminated, shall be deemed to be a change on December 31, 1939, in the character of the business, or

(5) of any other factor affecting the taxpayer's business which may reasonably be considered as resulting in an inadequate standard of normal earnings during the base period and the application of this section to the taxpayer would not be inconsistent with the principles underlying the provisions of this subsection, and with the conditions and limitations enumerated therein.

(c) *Invested Capital Corporations, Etc.*—The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer, not entitled to use the excess profits credit based on income pursuant to section 713, if the excess profits credit based on invested capital is an inadequate standard for determining excess profits, because—

(1) the business of the taxpayer is of a class in which intangible assets not includible in invested capital under section

718 make important contributions to income,

(2) the business of the taxpayer is of a class in which capital is not an important income-producing factor, or

(3) the invested capital of the taxpayer is abnormally low.

In such case for the purposes of this subchapter, such taxpayer shall be considered to be entitled to use the excess profits credit based on income, using the constructive average base period net income determined under subsection (a). For the purposes of section 713 (g) and section 743, the beginning of the taxpayer's first taxable year under this subchapter shall be considered to be that date after which capital additions and capital reductions were not taken into account for the purposes of this subsection.

(d) *Application for Relief Under this Section.*—The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710 (a) (5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the

purpose of determining the tax under this subchapter for a subsequent taxable year.

* * * * *

(26 U. S. C. Sec. 722.)

SEC. 728 [As added by Sec. 201 of the Second Revenue Act of 1940, *supra*]. MEANING OF TERMS USED.

The terms used in this subchapter shall have the same meaning as when used in Chapter 1.

(26 U. S. C. Sec. 728.)

SEC. 729. [As added by Sec. 201 of the Second Revenue Act of 1940, *supra*]. LAWS APPLICABLE.

(a) *General Rule.*—All provisions of law (including penalties) applicable in respect of the taxes imposed by Chapter 1, shall, insofar as not inconsistent with this subchapter, be applicable in respect of the tax imposed by this subchapter.

* * * * *

(26 U. S. C. Sec. 729.)

CHAPTER 37—ABATEMENTS, CREDITS, AND REFUNDS

* * * * *

SEC. 3771. INTEREST ON OVERPAYMENTS.

(a) *Rate.*—Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum.

* * * * *

(g) [added by Sec. 2 (b) of the Act of December 17, 1943, *supra*] *Claims Based Upon Relief Under Section 722.*—If any part of an overpayment for a taxable year beginning prior to January 1, 1942, is determined by the Commissioner to be attributable to the final determination of an

application for relief or benefit under section 722 for any taxable year, no interest shall be allowed or paid with respect to such part of the overpayment. If any part of an overpayment for a taxable year beginning after December 31, 1941, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year, no interest shall be allowed or paid with respect to such part of the overpayment for any period prior to one year after the filing of such application, or September 16, 1945, whichever is the later.

(26 U. S. C. Sec. 3771.)

SEC. 3794. INTEREST ON DELINQUENT TAXES.

Notwithstanding any provision of law to the contrary, interest accruing during any period of time after August 30, 1935, upon any internal-revenue tax (including amounts assessed or collected as a part thereof) not paid when due, shall be at the rate of 6 per centum per annum.

(26 U. S. C. Sec. 3794.)

Treasury Regulations 109, promulgated under the Internal Revenue Code:

Sec. 30.722–5 [As added by T. D. 5264, 1943 Cum. Bull. 761, and amended by T. D. 5393, 1944 Cum. Bull. 415]. *Application for Relief Under Section 722.*—(a) *Requirements for filing.*—Except as provided in section 710 (a) (5) and section 30.710–5 (relating to deferment of payment of excess profits tax in certain cases under section 722) and except as provided in (d) of this section, the taxpayer is not permitted to claim the benefits of section 722 in

computing its excess profits tax on its return, but must compute its excess profits tax, file its excess profits tax return, and pay the tax thus shown on such return without regard to the provisions of section 722. To obtain the benefits of section 722 for any taxable year beginning in 1940 or 1941, the taxpayer must, within the period of time for filing a claim for credit or refund and subject to the limitation as to amount of credit or refund prescribed by section 322 as applicable to the taxable year for which relief is claimed, file under oath an application on Form 991 (revised January, 1943) for the benefits of section 722, unless the provisions of (d) of this section are applicable to the taxpayer. Generally, an application for relief under section 722 must be filed for an excess profits tax taxable year within three years from the time the excess profits tax return for such year was filed, or within two years from the time the tax for such year was paid, whichever is the later. See section 322 and the regulations thereunder, however, as to the specific rules relating to the period of limitation upon the filing of claims for credit or refund, and the limitations upon the amount of credit or refund.

* * * * *

Except as otherwise provided in this section, the application on Form 991 (revised January, 1943) must set forth in detail and under oath each ground under section 722 upon which the claim for relief is based, and facts sufficient to apprise the Commissioner of the exact basis thereof. The mere statement of the provision or provisions of law under section 722 upon which the claim for relief is based shall not constitute an

application for relief within the meaning of section 722. It is incumbent upon the taxpayer to prepare a true and complete claim and to substantiate it by clear and convincing evidence of all the facts necessary to establish the claim for relief; failure to do so will result in the disallowance of the claim. * * *

* * * * *

(c) *Claim for refund.*—* * *

* * * * *

No interest shall be allowed or paid with respect to any part of an overpayment for a taxable year beginning in 1940 or 1941 which is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year. See section 3771 (g).

U. S. GOVERNMENT PRINTING OFFICE, 1934

No. [redacted]39

IN THE

Supreme Court of the United States

October Term 1973

THE UNITED STATES, *Petitioner*

v.

KOPPERS COMPANY, INC., Successor on Merger to Koppers United Company and Subsidiaries

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MEMORANDUM OF RESPONDENT IN OPPOSITION

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CITATIONS

CASES:

STATUTES:

IN THE

Supreme Court of the United States

October Term 1953

No. 609

THE UNITED STATES, *Petitioner*

v.

KOPPERS COMPANY, INC., Successor on Merger to Koppers United Company and Subsidiaries

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MEMORANDUM OF RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 14-29), entered December 1, 1953, is not yet officially reported.

JURISDICTION

The opinion and judgment of the Court of Claims were entered December 1, 1953. (R. 24) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255(1).

QUESTION PRESENTED

Whether the taxpayer is required by law to pay interest on theoretical deficiencies in excess profits taxes which never in fact existed when the excess profits credit under Section 722 of the Internal Revenue Code was properly reflected in determining taxpayer's excess profits tax liability.

STATUTES INVOLVED

The applicable portions of the pertinent statutes are set forth in the Appendix, infra, p. 6.

STATEMENT

The findings of fact of the Court of Claims are summaried as follows.

The taxpayer is a corporation which filed original and amended excess profits tax returns for the calendar years 1940 and 1941 and paid the taxes shown thereon to be due. (R. 25)

In arriving at the amounts of such taxes, the taxpayer used an excess profits credit computed without regard to Section 722 of the Internal Revenue Code. (R. 23, n. 10; R. 26)

Thereafter on September 15, 1943, the taxpayer filed applications asking for a larger excess profits credit based on a constructive average base period net income in accordance with Section 722 of the Internal Revenue Code. Amended applications were filed on September 10, 1945, and November 20, 1945. A constructive average base period net income under Section 722 was agreed to by the taxpayer and the Bureau of Internal Revenue, which amount was approved by the Excess Profits Tax Council of the Bureau on January 10, 1951 (R. 26)

In February 1951, the Bureau made computations to indicate that but for the use of the excess profits credit based on the constructive average base period net income, as provided by Section 722, the taxpayer would have been subject to additional excess profits taxes of $460,408.91 for

1940 and $426,730.95 for 1941, but as a result of the use of the excess profits credit allowed under Section 722, the additional taxes actually due were only $260,554.39 for 1940 and $95,749.33 for 1941. (R. 26-27)

On March 8, 1951 the Bureau issued a statutory notice of a determination of deficiencies, which read in part as follows:

> "You are advised that the determination of your excess profits tax liability for the years ended December 31, 1940, 1941, * * * discloses deficiencies of $260,554.39, $95,749.33, * * * respectively."

These amounts were assessed as deficiencies on April 17, 1951. (R. 28-29)

In the notice and demand for collection the Bureau included interest on the amounts of $460,408.91 and $426,730.95, instead of on the assessed deficiencies of $260,554.39 and $95,749.33 which it had finally determined to be due. (The taxpayer paid and does not contest the interest on the actual deficiencies of $260,554.39 and $95,749.33.) The excess interest of $94,358.71 for 1940 and $178,784.48 for 1941 was paid by the taxpayer and was found to represent an overpayment by the Court of Claims, and a judgment was entered for the taxpayer. (R. 29)

REASONS FOR DENYING THE WRIT

1. The decision of the Court of Claims is correct. Throughout his petition the Solicitor General insists on using the word "deficiencies" in referring to the theoretical amounts upon which the interest in controversy was computed by the Bureau, whereas it is clear that the only "deficiencies" under Section 271, I.R.C., were the amounts finally determined in the statutory notice of deficiency and assessed and collected as such. These real statutory deficiencies were the only amounts upon which the taxpayer was required by Section 292, I.R.C., to pay interest. These

amounts and interest thereon were paid by the taxpayer and are not in dispute.

Under Section 722 (a), if the tax "computed" without the benefit of the Section would be "excessive and discriminatory", then the tax is to be "determined" by using the constructive average base period net income "in lieu of" the actual average base period net income. What the government now seeks is interest on a tax "computed" but not "determined" and characterized by the statute itself as "excessive and discriminatory".

The Court of Claims considered this question first in *Henry River Mills Co.* v. *United States*, 1951, 96 F. Supp. 477, and decided in favor of the taxpayer. Thereafter, two District Courts also decided the question in favor of the taxpayer, *Premier Oil Refining Co. of Texas* v. *United States*, D.C., N.D., Texas, 1952, 107 F. Supp. 837, and *Kuder Citrus Pulp Co.* v. *United States*, D.C., S.D., Fla., 1953, 117 F. Supp. 395. When the government refused to follow these decisions, the Court of Claims again considered the problem in this case and speaking through Judge Littleton again decided in favor of the taxpayer. Thereafter, a third District Court came to the same conclusion in *Surface Combustion Corp.* v. *United States*, D.C., Ohio, 1953 P-H, par. 72,804. The only court which is in conflict with the Court of Claims is the Court of Appeals for the Fifth Circuit in *United States* v. *Premier Oil Refining Co. of Texas*, 1954, 209 F. 2d 692. Three District Courts and the Court of Claims on two different occasions having answered the question in favor of the taxpayer, there is no occasion for this Court to act.

2. Since the principle involved here is not like that in the carry-back cases such as *Manning* v. *Seeley Tube and Box Company*, 338 U.S. 561, and *Rodgers* v. *United States*, Ct. Cl., 108 F. Supp. 727, there is no conflict—in principle or otherwise—with those cases. In the carry-back cases, the deficiencies in the taxable years were eliminated by events which took place in subsequent years, while here all

the facts affecting the tax liability for 1940 and 1941 were actually in existence during the taxable years. Every court which has considered the question, except the Fifth Circuit, has distinguished the instant situation from that involved in the carry-back cases.

3. The question is one arising under a tax law which was repealed eight years ago, and it involves no question of national importance. The fact that there are still a large number of claims for relief under Section 722 for 1945 and prior years pending before the Internal Revenue Service and in the courts should not be a reason for this Court to grant a writ in this case, particularly where every court except one has agreed with the taxpayer. No suggestion is made by the Solicitor General that the granting of the writ will expedite the disposition of these claims by the Commissioner of Internal Revenue.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1954.

APPENDIX

Pertinent Sections of the Internal Revenue Code:

SEC. 271. DEFINITION OF DEFICIENCY.

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; * * *

SEC. 292. INTEREST ON DEFICIENCIES.

Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier.

SEC. 722. GENERAL RELIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

(a) GENERAL RULE.—In any case in which the taxpayer establishes that the tax *computed* under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be *determined* by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. * * * (Emphasis supplied.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 29

THE UNITED STATES, *Petitioner*

v.

KOPPERS COMPANY, INC., Successor on Merger to Koppers United Company and Subsidiaries

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENT

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period net income *in lieu of* the average base period net income."

In this case, therefore, there is only one excess profits tax imposed for the taxable year—the one determined under Section 722; computations as to what the tax would have been, but for this statutory direction as to how "the tax imposed" is to be determined, have no legal significance.

When all provisions of the Code relating to excess profits tax were applied to the taxpayer's situation for 1940, the amount by which the tax imposed exceeded the amount shown on its return was $260,554. This is the only amount ever determined as a deficiency in tax by the Commissioner and it is the only debt to the Government on which interest could be properly collected.

The Government argues that it is entitled to the excess interest because the taxpayer failed to comply with what the Government calls the "Congressional mandate" in Section 722(d). This section provided that—

> "The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section [Section 722] * * *."

The taxpayer in this case did comply with the requirements of Section 722(d). With respect to each of the years 1940 and 1941, it computed its tax, filed its return, and paid the tax shown on its return under Subchapter E without the application of Section 722. The Court of Claims so found. (R. 26.) Section 722(d) is neither a tax-imposing provision, nor an interest-imposing provision. It expressed only a rule of sound administration, and the taxpayer followed the rule exactly.

Section 3771(g), on which the Government also relies, says nothing about interest on a *deficiency*. Instead, it has to do with interest on *overpayments*. Since the question here is whether there was an actual deficiency which will support the Government's claim for interest, Section

3771(g) is not helpful in answering that question. In any event, it is in derogation of the long-standing policy of Congress to pay interest to taxpayers on overpayments of tax, and it certainly should not be extended to cases of "potential deficiencies" without express statutory provision.

The Government also argues that this case is ruled by *Manning* v. *Seeley Tube & Box Co.*, 338 U.S. 561, which dealt with a provision of law under which a taxpayer who suffered a net loss in 1943 was allowed relief from this 1943 hardship by allowing it to carry back the loss in abatement of the tax imposed on it for 1941.

The statutory provisions applicable to the two situations in which entirely different facts are presented are not at all parallel and the decision reached by the Court of Claims in this case does not conflict with any principle established by this Court in the *Seeley Tube* case.

In the instant case, the only deficiency in tax which this taxpayer owed for 1940 was that stated in the Commissioner's formal statutory notice of deficiency—$260,554. The Government was entitled to and duly received interest on this amount. The excess interest which is disputed—that computed on the difference between $260,554 and $460,408—was not computed on a deficiency in tax and there is no warrant in the statute for its collection. The Government should therefore be required to refund it.

ARGUMENT

The taxpayer's excess profits tax liability for 1940 and 1941 was determined by the Commissioner of Internal Revenue to be greater than that shown in the taxpayer's returns. The difference was a deficiency. (Sec. 271.) The Commissioner on March 8, 1951, issued a notice of deficiency—the *only* notice of deficiency—which read as follows:

> "You are advised that the determination of your excess profits tax liability for the years ended December 31,

1940, 1941, * * * discloses deficiencies of $260,554.39, $95,749.33, * * * respectively." (R. 28.)

The taxpayer paid these amounts; no change is suggested by either party; the Government does not ask for any more tax.

The Government collected interest as to each of the two years on these deficiencies. The taxpayer does not claim refund of that interest and it is not in dispute. But in addition, the Government has collected interest on two excess amounts—$199,854 for 1940 and $330,981 for 1941—which are not a part of the tax for either year.

The Government seeks to justify collection of this excess interest in the following ways:

By asserting that the "correct tax" was a tax computed by the use of the actual average base period net income method under Section 713 rather than by the use of the constructive average base period net income method under Section 722—an assertion which, the taxpayer submits, is refuted by the Commissioner's own undisputed determination as to what the correct tax was and by the express provisions of the Code.

By contending, on the basis of the foregoing assertion, that there was an "original deficiency" which included not only the actual deficiency which the Commissioner found, but which included additional amounts of tax described in the Code as "excessive and discriminatory", which the Congress chose not to exact.

By contending that Sections 722(d) and 3771(g) of the Internal Revenue Code in some way affect the long-established statutory rule in Sections 292(a) and 271(a) as to when taxpayers shall be liable for interest and on what principal sums.

By contending that the provision designed to mitigate the losses in a later year by carrying back such losses to abate the tax in a year in which there was no loss is in essence the same as the provision under which the excess

profits tax credit for a single taxable year is determined by one of three alternative methods.

Each of these contentions is contrary to law and each is unsound in substance.

I. The Government Is Entitled to Collect Interest Only on a Deficiency in Tax, and There Was No Deficiency Here on Which the Disputed Interest Could be Assessed.

The statute permits the Government to assess and collect interest "upon the amount determined as a deficiency" (Sec. 292). The statute defines a deficiency as "the amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer on his return" (Sec. 271). The statute authorizes the Commissioner to send a notice to the taxpayer when he has determined a deficiency, and prohibits any assessment of a deficiency until such a notice has been sent (Sec. 272(a)). The taxpayer may waive the restrictions on assessment by a notice in writing filed with the Commissioner.

In applying these statutory requirements to this case, the fundamental question is what was "*the tax imposed*", because a deficiency is the difference between the tax imposed and the tax shown on the return.

The Internal Revenue Code in Chapter 2, sections 710-784 inclusive, contains the provisions imposing an excess profits tax.* This tax was designed to tax abnormal profits which were considered to result from the war effort during the period 1940-1945.

In order to determine the tax under these provisions, the excess profits net income for the taxable year was first arrived at. In order to ascertain how much of it was abnormal or "excess", there was a provision for deducting an excess profits credit representing "normal

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* While the excess profits tax was imposed by Subchapter E of Chapter 2 of the Code (Secs. 710-784), the provisions in Chapter 1, in which sections 271, 272 and 292 are found, were made applicable by sections 728 and 729.

earnings" so that after the credit was taken, the remainder could properly be subjected to the high excess profits tax rate.

Congress foresaw that various difficulties would be encountered in arriving at a fair figure for this credit and provided three alternative methods for doing so:

No. 1—An average base period net income method (Sec. 713).

No. 2—An invested capital method (Sec. 714).

No. 3—In certain cases where the credit computed under method No. 1 or No. 2 would result in an "excessive and discriminatory tax", a method based on a *constructive* average base period net income (Sec. 722).

Congress also foresaw the administrative problem which would arise if each taxpayer were permitted to apply the complicated provisions of Section 722 in making its return. Congress therefore provided in Section 722(d) that the taxpayer should compute its tax, file its return and pay the tax shown on the return without applying Section 722. It could then request that its credit be determined under Section 722.

The taxpayer followed this procedure. It computed its tax and filed its return using method No. 2—the invested capital method. During the audit, it became evident that the Revenue Agent and the taxpayer could not agree on the proper application of that method, and method No. 1—the average base period net income method—was proposed as an alternative. But because the taxpayer believed a tax computed under method No. 1 would be "excessive and discriminatory", the taxpayer asked that its tax be computed using method No. 3.

The Commissioner and the taxpayer finally agreed in 1950 that the taxpayer had shown the tax computed under method No. 1 would be excessive and discriminatory and that the tax should be computed under method No. 3. The

tax computed using method No. 3 was $267,067 for 1940 and $1,877,037 for 1941. (R. 4-5, 7.) These amounts were "the tax imposed" by the Code. They were $260,554 and $95,749 greater than the amounts shown on the tax returns, and a deficiency in the latter amounts therefore resulted. They were the only deficiencies for 1940 and 1941 because they were the only amounts by which the tax imposed for each year exceeded the amounts shown as the tax on the returns.

The Government argues (Brief, p. 10) that the Commissioner "computed and determined the excess profits tax deficiencies both before and after applying Section 722 relief". The Government thus argues that there were two statutory deficiencies for each year. For 1940, this would mean that there must have been a statutory deficiency of $460,408 which was later reduced by Section 722 with a resulting statutory deficiency of $260,554. Carried a step further, if the Government is right, there were two taxes "imposed" for 1940, one for $466,921 and the other for $267,067.

To the contrary, the statute imposes only one tax. This is recognized in the Treasury's own Regulations, Section 30.722-2,* entitled "Constructive Average Base Period Net Income", which provides that, in general, if a taxpayer qualifies and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income,

> "* * * the excess profits *tax* for the taxable year shall be determined by using the excess profits credit computed upon the basis of such constructive average base period net income *in lieu of* the actual excess profits credit based on income or invested capital, as the case may be." (Emphasis supplied.)

The conclusion reached in the regulations is clearly required by the statute. Section 710 provides that "there

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* As added by T.D. 5264, 1943 Cum. Bull. 761.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 29

THE UNITED STATES, *Petitioner*

v.

KOPPERS COMPANY, INC., Successor on Merger to Koppers United Company and Subsidiaries

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On Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Court of Claims (R. 14-29) is reported at 126 C. Cls. 847, and at 117 F. Supp. 181.

JURISDICTION

The judgment of the Court of Claims was entered December 1, 1953. (R. 14, 29.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255(1). The petition for certiorari was filed on March 1, 1954 and certiorari was granted on May 17, 1954. (R. 41.)

STATUTES INVOLVED

The pertinent statutory provisions (Sections 271, 272, 292, 322, 710, 713, 714, 722, 728, 729, and 3771 of the Internal Revenue Code of 1939) are printed in the Appendix at pages 28 to 36.

QUESTION PRESENTED

Whether the Commissioner of Internal Revenue was entitled under the Internal Revenue Code to charge this taxpayer for interest on amounts of money which were not a part of the tax imposed on the taxpayer by the excess profits tax provisions of the Code.

STATEMENT

The taxpayer, respondent herein, seeks to recover certain amounts which were exacted as interest by the Commissioner. This disputed interest was computed on amounts which under the law are excessive and discriminatory and which are no part of the tax imposed. These amounts are hypothetical in character, merely representing the amounts which would have been part of the tax imposed had the taxpayer not been entitled to have its tax determined in accordance with Section 722 of the Internal Revenue Code of 1939, instead of Section 713 or Section 714.

The taxpayer contends that there was no legal basis for the Commissioner's action, and, in addition, that it is unreasonable to impute to Congress an intent to allow the Commissioner to collect interest on an amount which was never a part of the tax imposed. The Court of Claims has

considered this problem in three different cases and has agreed with the taxpayer's contentions each time, as have three District Courts. The only court which has disagreed is the Court of Appeals for the Fifth Circuit.*

The findings of fact of the Court of Claims are printed in the record at pages 25 to 29. The taxpayer believes that certain facts omitted from the Government's statement of the case are essential to a clear understanding of the issue, and therefore summarizes the facts as follows.

Koppers Company, Inc., is the successor, through a statutory merger effected in 1944, to Koppers United Company and its subsidiaries. For convenience, both Koppers Company, Inc., and its predecessor are referred to as the taxpayer.

The taxpayer filed original and amended consolidated excess profits tax returns for the calendar years 1940 and 1941. The amended return for 1940 showed excess profits net income of $3,653,890,** an excess profits credit of $3,623,876, and an excess profits tax liability of $6,512, which was paid. The amended return for 1941 showed excess profits net income of $6,545,206, an excess profits credit of $3,494,726, and an excess profits tax liability of $1,781,288, which was paid. (R. 25-26.)

In arriving at the amounts of such taxes, the taxpayer used an excess profits credit computed on the invested capital basis under Section 714 of the Internal Revenue Code. This credit was computed without the application

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* The courts have agreed with the taxpayer's contentions in Henry River Mills Company v. United States, 96 F. Supp. 477 (Ct. Cls. 1951); Koppers Company, Inc. v. United States, 117 F. Supp. 781 (Ct. Cls. 1953); Linn Mills v. United States, 121 F. Supp. 887 (Ct. Cls. 1954); Premier Oil Refining Company of Texas v. United States, 107 F. Supp. 837 (N.D. Texas, 1952); Kuder Citrus Pulp Company v. United States, 117 F. Supp. 395 (S.D. Fla., 1953); and Surface Combustion Corporation v. United States, 53-2 U.S.T.C. ¶ 9653, 4 P-H 1953 Fed. Tax Serv. ¶¶ 72,793 and 72,804 (N.D. Ohio, 1953). To the contrary is United States v. Premier Oil Refining Company of Texas, 209 F. 2d. 692 (C.A. 5, 1954).

** Fractions of a dollar are omitted throughout.

of Section 722 of the Internal Revenue Code. (R. 23, n. 10; R. 26.)

On September 15, 1943, the taxpayer filed applications asking to have its excess profits credit computed on a constructive average base period net income in accordance with Section 722 of the Internal Revenue Code. Amended applications were filed on September 10, 1945, and November 20, 1945. (R. 26.)

At various times the Internal Revenue Agent in Charge at Pittsburgh sent to the taxpayer copies of the Revenue Agent's Reports, showing a series of proposals using an excess profits credit based on the actual average base period net income under Section 713, as follows: On September 23, 1946, there was proposed for 1940 an excess profits net income of $4,158,504, an excess profits credit of $2,612,509, and an excess profits tax deficiency of $710,753. On March 1, 1949, the proposals were changed so that there was then proposed for 1940 an excess profits net income of $3,543,895, an excess profits credit of $2,256,809, and an excess profits tax deficiency of $594,385. On April 29, 1949, there was proposed for 1941 an excess profits net income of $6,102,978, an excess profits credit of $2,576,117, and an excess profits tax deficiency of $272,078. (R. 26-27.)

On December 16, 1950, the taxpayer executed an "Agreement to Amount of Constructive Average Base Period Net Income Determined under Section 722, Internal Revenue Code", agreeing to a constructive average base period net income under Section 722 of $2,801,598 for 1940 and $3,394,944 for 1941. The amounts agreed to were approved by the Excess Profits Tax Council of the Bureau on January 10, 1951. (R. 26.)

On February 9, 1951, the Internal Revenue Agent in Charge in Pittsburgh sent to the taxpayer a letter reflecting this agreement. It showed deficiencies in excess profits taxes of $260,554 for 1940 and $95,749 for 1941. (R. 27.)

On February 14, 1951, the taxpayer filed a waiver on

Treasury Form 874, consenting to the assessment and collection of the proposed deficiencies of $260,554 for 1940 and $95,749 for 1941, "together with interest thereon as provided by law". (R. 27; Exhibit K to McLaughlin Affidavit, not printed but part of the Record, R. 39.)

On February 26 and 27, 1951, an Abnormality Claims Reviewer in the Commissioner's office in Washington made computations to show what the excess profits tax liability for 1940 and 1941 would have been, using the actual average base period net income of the taxpayer under Section 713 instead of its constructive average base period net income under Section 722. (R. 27-28.)

This computation indicated that if Section 722 had not been applicable and if the tax had been computed under Section 713, there would have been additional excess profits taxes of $460,408 for 1940 and $426,730 for 1941 instead of $260,554 and $95,749 as determined by the Commissioner and agreed to by the taxpayer. Interest of $217,376 was computed on $460,408 from March 15, 1941 to January 28, 1949. Interest of $230,504 was computed on $426,730 from March 15, 1942 to March 16, 1951. (R. 27-28.)

No notice of deficiency was issued by the Commissioner with respect to the results of his computation of the excess profits tax liability without the application of Section 722. (R. 28.)

On March 8, 1951, the Commissioner issued a statutory notice of deficiency, setting forth the deficiencies agreed upon on February 14, 1951. These deficiencies—$260,554 for 1940 and $95,749 for 1941—were assessed on April 17, 1951, together with interest of $217,376 for 1940 and $230,504 for 1941. The assessments were paid on April 24, 1951. (R. 28-29.)

The undisputed interest on the 1940 deficiency of $260,554 from March 15, 1941, to January 28, 1949, is $123,017. The undisputed interest on the 1941 deficiency of $95,749 from March 15, 1942, to March 16, 1951, is $51,720. (R. 29.)

The taxpayer filed a timely refund claim for $94,358

representing the difference between the interest paid for 1940, $217,376, and the undisputed interest of $123,017. Likewise, a claim for refund was filed for $178,784, representing the difference between the interest paid for 1941, $230,504, and the undisputed interest of $51,720. (R. 29.)

The Court of Claims found that the taxpayer is entitled to recover excess interest of $94,358 for 1940 and $178,784 for 1941, less a set-off of $2,926, and a judgment was entered for $270,216, with interest thereon as provided by law. (R. 29.)

SUMMARY OF ARGUMENT

The Internal Revenue Code has specifically dealt with the subject of interest on income and excess profits taxes,* and it does not authorize the collection of the interest here in controversy. The Government is authorized to collect interest "upon the amount determined as a deficiency" (Sec. 292). The Code defines a deficiency as the "amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return" (Sec. 271).

In this case the only unpaid taxes for 1940 and 1941 were the deficiencies which existed for those years. The only deficiencies ever determined by the Commissioner of Internal Revenue were those set forth in his notice of deficiency dated March 8, 1951 as follows:

> "You are advised that the determination of your excess profits tax liability for the years ended Dece ber 31, 1940, 1941, * * * discloses deficiencies of $260,554.39, $95,749.33, * * * respectively." (R. 28.)

The taxpayer consented to the assessment and collection of the deficiencies in tax in the amounts of $260,554 for

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* In the following sections of the Internal Revenue Code of 1939, Congress has given attention to interest questions: 22(d)(6)(A) and (F), 127(c)(5), 131(e), 146(f), 292(a), 292(b), 292(c), 292(d), 293(a), 294(a)(1), 294(a)(2), 294(b), 295, 296, 297, 298, 506(b), 506(j)(2)(A), 781(e), 784(b), 3746(d), 3771(a) and (b), 3771(d), 3771(e), 3771(g), 3773, 3779(i), 3794, 3804(a), 3804(f), and 3808(b)(4).

1940 and $95,749 for 1941, together with interest *thereon* as provided by law. (R. 27; Exhibit K to McLaughlin Affidavit, not printed but part of the Record.)

The Commissioner then made the following assessments and demanded payment:

	Deficiency in Tax	Interest
1940	$260,554	$217,376
1941	95,749	230,504

(R. 29.)

For simplicity, further discussion in this summary is limited to the year 1940. The same considerations apply to 1941, though different amounts are involved.

Interest for the proper period at 6% on the tax deficiency of $260,554 for 1940 is $123,017. It is thus apparent that the Government assessed *excess* interest of $94,359 ($217,376 minus $123,017) on the 1940 deficiency. Likewise, excess interest was assessed on the 1941 deficiency. The aggregate amount of this excess interest is the interest in dispute.

This excess interest was assessed on an amount which was not a part of the excess profits tax imposed. It purports, instead, to be computed on an amount—often referred to as a "potential deficiency"—which would have been a part of the tax if Section 722 had not required a different result.

Section 722 is an integral part of the Code provisions imposing the excess profits tax. In a case in which Section 722 is applicable, a tax computed without Section 722 is not "the tax imposed" for the taxable year, and the statute declares a tax so computed to be "excessive and discriminatory".

The Code in Section 722(a) expressly provides that in any case to which Section 722 applies "the tax shall be determined" by using the "constructive average base

Whatever Congress might have done, it did not change the definition of a deficiency, nor did it require the payment of interest on an amount which was not a deficiency. A deficiency is still defined as the difference between *the tax imposed* and the amount shown as the tax by the taxpayer upon his return. Interest is specifically required by Congress to be paid only on a deficiency. The Government would have this Court believe that Congress required interest to be paid on an amount which never qualified as a deficiency. The Code contains no such provision, and certainly it should not be inferred from a section in derogation of the taxpayer's ordinary and long-standing right to interest on *overpayments*.

III. The Decision of the Court of Claims Does Not Depart From the Principles Established by This Court's Decision in Manning v. Seeley Tube & Box Co.

The Government contends that the issue here presented is "essentially the same issue as was presented in *Manning* v. *Seeley Tube & Box Co.*, 338 U.S. 561," and Judge Madden of the Court of Claims in his dissenting opinion said that the difference between this case and *Seeley Tube* and similar loss carry-back cases is "more apparent than real".

The difference between the issue in that case and the issue in this case is not only apparent but is very real; in fact, it is fundamental.

In the *Seeley Tube* case, the tax imposed for 1941 was greater than the amount shown on the 1941 return. The Commissioner issued a statutory notice of deficiency and the company, by not contesting it, admitted that the tax imposed was greater than it had shown on its return. Thus there was a real, admitted deficiency for 1941.

In 1943—two taxable years later—Seeley Tube had a net operating loss. Under the carry-back provisions this produced an abatement and cancellation of all of the tax liability for 1941, because the 1943 loss was greater than

the entire taxable income for 1941. Under those circumstances, this Court held—and we think rightly—that the interest on the 1941 deficiency was properly collected and retained by the Government.

At the end of the taxable year 1941, no one could tell that Seeley Tube would have a net loss in the year 1943, and consequently, that a part of the 1941 tax would be later abated. It was not until the year 1943 that Seeley Tube suffered losses, and in mitigation of these 1943 losses, the law allowed it a cancellation of all the income and excess profits tax which had been imposed for 1941. It was, as the Court held, a subsequent abatement and remission of the tax imposed for the earlier year. In the instant case, the tax imposed was determined under Section 722 on the facts existing at the end of the taxable year. *There was no subsequent abatement because of facts occurring in a later taxable year.*

In discussing provisions of law as to the earlier year, independent of carry-backs, this Court in *Seeley Tube* recognized that they imposed a tax "actually due" that year and that if a taxpayer underpaid the tax actually due for that year, interest exacted on the underpayment—an actual deficiency—would not be refunded when later carry-back adjustments resulted in remitting the tax. Mr. Chief Justice Vinson, speaking of the tax imposed for 1941, pointed out that the statute required the taxpayer—

> "* * * to file a return for the previous fiscal year and pay the amount of the tax actually due for that year. If this return is erroneously calculated and the payment is less than the tax properly due, the Commissioner * * * may assess a deficiency, the difference between the tax imposed by law and the tax shown upon the return. Interest upon this deficiency * * * was lawfully due * * *." (338 U.S. at 565.)

The Chief Counsel of the Bureau of Internal Revenue recognized that the decision rested on the presence of a real deficiency for the earlier year. In reviewing an earlier

shall be levied * * * on the adjusted excess profits net income * * * *the tax* shown in the following table: * * * ". Section 722 provides that if the taxpayer establishes that "*the tax* computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax * * *, *the tax* shall be determined by using such constructive average base period net income *in lieu of* the average base period net income otherwise determined under this subchapter". This is entirely inconsistent with the statement in the Government's brief, page 5, that the tax was "abated", and no support is found for such a statement in the findings of the Court of Claims, page 29 of the Record, or elsewhere.

In other words, the statute tells the taxpayer that if a tax computed under method No. 1 or method No. 2 would be excessive and discriminatory, it can have its tax determined by using method No. 3 *in lieu of* the other methods. The tax arrived at under the method agreed upon is "the tax imposed" by the statute. As Judge Littleton said in writing the opinion of the Court of Claims in this case,

> "* * * A review of the history and purpose of Section 722 convinces us that it is merely a refinement of the basic policy embodied in the excess profits tax scheme and not a departure from it. It affords an alternative formula for determining the amount to be exacted when the economic facts of a particular corporation will not fit properly into the 'average base period net income' mechanism. The result sought is a fair and equitable tax *in lieu of*, not *in mitigation of*, an excessive and discriminatory one. It follows therefore that where the factual and procedural requirements of Section 722 have been met, the Commissioner must take cognizance of that section in 'determining' a 'deficiency', as those terms are used in Sections 292(a) and 271. In so doing the constructive average base period net income must of necessity be used in arriving at the basis on which interest is computed as for the determination and assessment of the tax itself. Once Section 722 is, on the facts established, brought to bear on an appropriate situation it is an integral part of

the applicable tax law and cannot be employed electically by the Commissioner of Internal Revenue. * * *" (R. 19-20.) (Emphasis by the Court.)

To adopt the Government's argument would be to say that although a tax computed under method No. 1 or No. 2 would be excessive and discriminatory, Congress nevertheless intended to collect interest on the excessive amount, even though it refrained from imposing such an excessive and discriminatory tax. The taxpayer submits that to impute such an intent to Congress—in the absence of an express statutory provision—is wholly unreasonable.

Moreover, the Government's argument that there were two deficiencies *determined* for each taxable year—one before and one after the application of Section 722—is refuted by what the Commissioner did in this case.

On December 16, 1950, the taxpayer and the Commissioner agreed upon a constructive average base period net income and on January 10, 1951, this agreement was approved by the Excess Profits Tax Council of the Bureau. On February 9, 1951, the Revenue Agent in Charge sent a letter to the taxpayer, reflecting this agreement and proposing deficiencies of $260,554 for 1940 and $95,749 for 1941. (R. 26-27.) Contrary to the Government's brief, page 3, there was no agreement whatever at any time between the Government and the taxpayer with respect to the amount of any excess profits tax liability without the application of Section 722, nor did the letter of February 9 show or reflect any such amount. On February 14, 1951, the taxpayer consented to the immediate assessment and collection of these deficiencies "together with interest as provided by law".

It was not until February 26 and 27, 1951, that a subordinate in the Commissioner's office in Washington made computations to show that the deficiencies without the application of Section 722 would have been $460,408 for 1940 and $426,730 for 1941. The work sheets on which these computations were made are printed at pages 36A

and 38A of the Record. It is apparent that they were for internal purposes in the Bureau. No notice—formal or otherwise—of these computations was ever sent to the taxpayer prior to the filing of this action. (R. 28.)

The Government's brief (pp. 3-4) states that the foregoing "computations were made by the Commissioner in accordance with the administrative practice of first determining the excess profits tax liability without the allowance of any relief provided by Section 722, and then giving effect to the relief allowed under that section." If such was the usual administrative practice, obviously the Commissioner did not follow it in this case, since the deficiencies arrived at by using the constructive average base period net income under Section 722 were proposed by the Revenue Agent on February 9th and were accepted by the taxpayer on February 14th, while the computations were not made until February 26th and 27th, 1951. (R. 27-28.)

Then on March 8, 1951, the Commissioner confirmed the agreement by issuing his statutory notice in which he said that a *determination* of the tax liability for 1940 and 1941 disclosed deficiencies of $260,554 and $95,749. (R. 28.) The Commissioner's counsel can hardly contend now that the Commissioner ever *determined* a deficiency of $460,408 for 1940 and $426,730 for 1941 in face of the fact that he gave no indication of any such action at the time. Moreover, no deficiencies in those amounts ever existed.

The Government uses in its brief such terms as "correct tax", "original deficiencies", "residual deficiencies", "pre-existing deficiencies", and "net amounts of the deficiencies" to avoid the plain terms of the statute. The Code provides for the imposition of one tax and defines a deficiency as the excess of the tax imposed over the tax shown on the return. There was only one tax imposed and there can be only one deficiency for each year in this case. The taxpayer paid the interest on these deficiencies and submits that the exaction of "interest" on any other amount is wholly unwarranted.

Moreover, these deficiencies are the only amounts on which the Government should want to collect interest; if the principal sums are excessive and discriminatory, interest collected on them is likewise excessive and discriminatory.

II. Neither Section 722(d) Nor Section 3771(g) Supports the Government in This Case.

A. Section 722(d)

Section 722(d) provides, with respect to taxpayers who seek to have their excess profits tax determined under the Section 722 method, that—

> "The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, * * * ."

Apparently overlooking Finding 1(c), R. 26, the dissenting judge in the Court of Claims thought the taxpayer here had failed to comply with this provision, and that it had thereby deprived the Government of the use of money for which it should pay interest. The Government, ignoring Finding 1(c), relies heavily on the taxpayer's assumed failure to comply with this section.

It should suffice to point out that the Court of Claims found in this case, with respect to the excess profits tax returns for both years, that—

> "The returns mentioned in the two paragraphs next above were made and the tax reported thereon was computed without the application of Section 722 of the Internal Revenue Code." (R. 26.)

Also, the taxpayer's returns for 1940 and 1941* show that the taxpayer filed its returns under method No. 2, the invested capital method prescribed in Section 714. As the majority opinion of the Court of Claims pointed out,

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* Not printed, but filed as part of the record in this Court.

> "On the record before us it would appear that plaintiff's returns as filed reflected substantially the correct amount of tax under the theory on which those returns were made and the tax computed, i.e., Equity Invested Capital. It was only when the 'average earnings' method was employed by the Commissioner that the 'potential deficiencies' now in question resulted." (Note 10, R. 23.)

The taxpayer here did exactly what Section 722 (d) required—it made its returns without applying Section 722 and paid the tax shown to be due on the returns. The Commissioner of the Court of Claims so found in Finding 1(c), R. 10, and the Government took no exception to this finding as it was permitted to do under Rule 46 of the rules of the Court of Claims. The Court, having considered the evidence and the report of its commissioner, made the same finding, R. 26. No objection was raised to this finding in the Government's petition for certiorari. The question of the correctness of this finding is therefore not before this Court.*

But even if this question were open, the Government's argument is completely unsound. The Government reads into Section 722(d) a "mandate", and asserts (Brief, p. 21) that—

> "* * * the Congressional intent to require computation and *full payment* of the tax when the return is due, without the application of Section 722, could hardly have been expressed in more unequivocal terms." (Emphasis supplied.)

Section 722(d), however, says nothing about "full payment of the tax", nor does it say that the taxpayer must pay

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* In United States v. New York Indians, 173 U.S. 464, this Court said: "This court has repeatedly held that the findings of the court of claims in an action at law determine all matters of fact, like the verdict of a jury, and that where there is any evidence of a fact which they find, and no exception is taken, their finding is final * * *." Cf. Stone v. U.S., 164 U.S. 380 (1896) and United States v. Penn Foundry & Mfg. Co., 337 U.S. 198, 205 (1949).

"the tax imposed" nor "the tax ultimately determined by the Commissioner to be the tax due".

The statute does say that the taxpayer "shall compute its tax, file its return, and pay the *tax shown on its return*" without applying Section 722.

What did Congress mean when it directed the taxpayer to "compute its tax" and "pay the tax shown on its return"? After many years experience with tax returns of large corporate groups, Congress knew that it would be a rare occasion indeed when such a return, with all of its complicated legal and accounting problems, would show on its face the ultimate tax liability—"the tax imposed". Congress knew that these complicated returns inevitably give rise to differences between the taxpayer and the Government, and that these differences often involve large sums, requiring many years of careful consideration by both parties before the final tax liability—"the tax imposed"—is settled.*

The Internal Revenue Code is highly technical in some of its parts, and therefore the most careful attention is given to its drafting. Had Congress intended Section 722(d) to have the meaning the Government argues for, it could have directed the taxpayer "to compute and to pay

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* In view of the difficulty which the Revenue Agent actually experienced in making a computation of the taxpayer's excess profits tax liability without using Section 722, it is not surprising, and certainly not reprehensible, that the taxpayer, in the year 1941 when its 1940 return was filed, did not forecast the tax liability which would be agreed upon in 1951 after extensive examinations and negotiation covering a period of ten years. The findings of the Court of Claims show the difficulty which the Revenue Agent had in making up his mind what this 1940 computation should be. As of September 23, 1946, it shows that he thought $710,753 was right. By March 1, 1949, he had concluded that the foregoing figure was wrong and that the right figure was $594,385, but in 1951 he finally concluded that both of his previous computations were wrong and that since Section 722 was applicable, the deficiency was $260,554. At no time did the Revenue Agent who audited these returns ever propose a deficiency of $460,408 for 1940—the amount on which the Government has computed interest.

the tax imposed" without the application of Section 722. But Congress knew that such a direction would be futile in the case of these corporate groups, because not a single one could ever hope to forecast in its return the tax liability on which it would finally agree with the Commissioner, regardless of the penalty.

All Congress intended, as the legislative history indicates, was that the taxpayer compute its tax and pay the tax shown on the return without trying itself to apply the completely new and complicated provisions of Section 722. There is no indication that it intended or even hoped that Section 722(d) would bring about the revolutionary result of having every corporate taxpayer compute its tax in such a way as to reflect complete agreement with the Commissioner on every provision of the Code except Section 722. But the Government says that is what was required—"full payment of the tax when the return is due"—and that failure to pay the exact amount results in interest on a "potential deficiency".

To the contrary, Congress added Section 722(d) to the Code in 1941 to express a rule of good administration, as shown by the Senate Report:*

> "*Administrative procedure.*
>
> "It is deemed advisable in the interest of good administration, in view of the nature of the problem presented by section 722, that the taxpayer should not be permitted to apply the section in the computation of the excess-profits tax liability shown upon its return and that the taxpayer should be required to conform to reasonable restrictions with respect to the time within which it may make application for the benefits of the section. Accordingly, under the provisions of subsection (e) [(d) in H. Rept.] a taxpayer is not permitted to claim the benefits of section 722 in computing its tax upon the return. * * * "

* Senate Report No. 75, 77th Congress, 1st Session (1941), p. 13.

Without that provision a taxpayer entitled to Section 722 treatment would have made its return using method No. 3. Congress, having determined for good reasons that the Government should participate in the application of this method because of its difficulty, directed in Section 722(d) what the taxpayer should do at return-time, that is, that it should compute its tax "without the application of Section 722". It is a negative provision, not an affirmative imposition of tax; no tax-imposing words appear in it. The direction is that the "tax shown on the return" shall be paid. Certainly there are no provisions in it changing the rules in Section 292 governing interest, nor are there any provisions in it which change the definition of deficiency in Section 271.

If Congress had really wanted to charge this taxpayer $94,359 for 1940 and $178,784 for 1941 of so-called interest on the phantom deficiency because of the taxpayer's failure to foresee an amount which did not play any part in determining the tax imposed, Congress would have done so by modifying the definition of deficiency in Section 271.

The Government argues (Brief, pp. 17-18) that to sustain the Court of Claims would be to invite any taxpayer on the due date of its return to hazard a guess whether and to what extent Section 722 might be applicable. It points out dire consequences which would follow. But regardless what may happen if a taxpayer should hazard such a guess and try to imagine what will be the tax imposed after Section 722 is applied, the simple, uncontroverted fact is that this taxpayer did not hazard such a guess. Instead, it computed its tax (on the invested capital method), filed its returns, and paid the taxes shown on its returns under this subchapter without the application of Section 722—just as Section 722(d) required it to do. (R. 26.)

The majority opinion of the Court of Claims makes adequate answer to the Government's argument that the taxpayer would be encouraged not to comply with the direction

that the tax computed without Section 722 shall be paid in by the taxpayer:

> "* * * While there is no doubt that 722 (d) could not be ignored, and the taxpayer could not anticipate the applicability of, or apply, Section 722 in its original return, we are of the opinion that the remedy for its violation or for failure otherwise to file a substantially correct return is to be found in the penalty provisions of the U. S. Code rather than Section 292 (a), under the provisions of which we think, in view of the facts and circumstances of this case, an attempt has been made to exact illegal and unauthorized interest on 'potential' deficiencies never 'determined' under the statute nor authorized to be asserted by law." (R. 22-23.)

Congress did not say in Section 722(d) that the taxpayer must file an absolutely correct return and pay exactly what would ultimately be determined to be the correct tax. It only required that whatever the taxpayer did in computing its tax—presumably its best honest effort—it must not apply Section 722 in its computation. This taxpayer fully complied with that requirement.

B. Section 3771(g)

The Government relies on Section 3771(g) which denies to the taxpayer interest on overpayments made under Section 722 for the years 1940 and 1941 and thus allows the Government free use of the taxpayer's money for a period ending when the Government refunds to the taxpayer these overpayments. The Government fails to demonstrate, however, how a section which has to do with interest on *overpayments* can furnish the missing statutory authority for collecting interest on an amount which does not satisfy the statutory definition of a *deficiency*.

The Government argues that since Section 3771(g) allows no interest on overpayments resulting from the application of Section 722 for the years 1940 and 1941, Congress intended that the Government should have free use for an

indefinite period of time of a part of the taxpayer's money in every case in which the provisions of Section 722 were applicable. Thus, the Government seeks to charge taxpayers interest on an amount representing the "excessive and discriminatory" tax which would have been paid if the third credit-computing method had not been applicable.

This Court has frequently held that neither the administrative taxing authorities nor the courts can supplant Congress in the legislative field, particularly as to taxes. Whether or not the Commissioner believes that Congress should have enacted a corresponding provision requiring taxpayers to pay interest on a failure to make the overpayments, the fact remains that, when enacting Section 3771(g), Congress chose not to enact any provision supporting the Government in its collection of this interest and the Commissioner was without power to supply what he deemed to be an omission.

The limitation in Section 3771(g) on the allowance of interest on an overpayment of tax is in derogation of a legislative policy almost as long standing as the income tax.* The Government apparently argues that because Congress departed in this one instance from its history of fair dealing with taxpayers with respect to interest on *overpayments*, it should be inferred that Congress meant also to exact interest from taxpayers even though the necessary *deficiency* did not exist on which such interest could be based. Had Congress so intended, it presumably would have expressed that intention in the Code.

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* When Congress inserted the provisions for interest on overpayments of taxes in the Revenue Act of 1921, it said (Sen. Rept. No. 275, 67th Congress, 1939-1 (Pt. 2) Cum. Bull. 204):

> "Section 1324 makes an important change from existing law in providing that interest shall be paid on the overpayment of taxes at the rate of 6 per cent a year * * *. This provision is inserted for the purpose of expediting the refund of taxes and compelling the Government, in the event that such refund is unnecessarily delayed, to pay interest at the ordinary rate."

opinion of his office in the light of the *Seeley Tube* decision, he said:*

> "* * * In concluding that the Bureau was entitled to interest, *the Supreme Court necessarily concluded that there was a real deficiency* existing prior to the occurrence of the carry-back loss *since the right to interest is dependent upon the existence of a deficiency.* * * *" (Emphasis supplied.)

In the instant case, the excess profits tax imposed could not be arrived at until all the provisions of law applicable to 1940 were applied to the facts existing up to the end of that year. When that task was completed, the 1940 tax imposed was determined by the Commissioner to be $260,554 greater than the tax shown on the return, and that amount alone constituted the deficiency. It was paid, together with interest on that amount. This deficiency was determined with reference to the events of 1940, and unlike *Seeley Tube,* subsequent events were not material. This deficiency and a similar deficiency for 1941 and the interest on those deficiencies are all that the Government is entitled to collect.

There is no soundness in the Government's argument that it can arrive at the tax imposed by law by applying only *part* of the Code provisions applicable to 1940, and that it can then wipe out a portion of that tax by applying the rest of the excess profits tax provisions, thus creating a situation "essentially the same" as a carry-back provision.

CONCLUSION

This is a case where the taxpayer established that a tax computed under Section 713 would be "excessive and discriminatory". It thereby became mandatory upon the Commissioner to determine the tax under the provisions of Section 722(a). This he did, yet he then computed

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* GCM 26455, 1950-1 Cum. Bull. 118.

interest not on the tax so determined but on that amount which is not only described by the statute as "excessive and discriminatory", but which is not the amount of any tax imposed by law. We submit that any such result is contrary to the plain provisions of law relating to the collection of interest and should be rejected by this Court.

The judgment of the Court of Claims should be affirmed.

Respectfully submitted,

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APPENDIX

INTERNAL REVENUE CODE OF 1939

CHAPTER 1—INCOME TAX

* * * * *

SEC. 271. DEFINITION OF DEFICIENCY

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(b) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.
(26 U.S.C. Sec. 271.)

* * * * *

SEC. 272. PROCEDURE IN GENERAL.

(a)(1) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in

court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. * * *

* * * * *

(d) *Waiver of Restrictions.*—The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency. (26 U.S.C. Sec. 272.)

* * * * *

SEC. 292. INTEREST ON DEFICIENCIES.

(a) *General Rule.*—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272 (d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. If any portion of the deficiency assessed is not to be collected by reason of a prior satisfaction, in whole or in part, of the tax, proper adjustment shall be made with respect to the interest on such portion.

(b) [Added by Section 2 of the Act of December 17, 1943, c. 346, 57 Stat. 601.] *Deficiency Resulting From Relief Under Section 722.*—If any part of a deficiency for a taxable year beginning prior to January 1, 1942, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year, no interest shall be assessed or paid with respect to such part of the deficiency. If any part of a deficiency for a taxable year beginning after December 31, 1941, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any

taxable year (excluding any portion of a deficiency of excess profits taxes constituting a deficiency by reason of deferment of tax under section 710 (a) (5), and excluding, in case the taxpayer has availed itself of the benefits of section 710 (a)(5), such portion of a deficiency under Chapter 1 as may be determined by the Commissioner to exceed any refund or credit of excess profits tax arising from the operation of section 722), no interest shall be assessed or paid with respect to such part of the deficiency for any period prior to one year after the filing of such application, or September 16, 1945, whichever is the later. (26 U.S.C. Sec. 292.)

* * * * *

SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—

(1) Overpayment.—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.
(26 U.S.C. Sec. 322)

* * * * *

CHAPTER 2—ADDITIONAL INCOME TAXES

* * * * *

SUBCHAPTER E—EXCESS PROFITS TAX

SEC. 710 [As added by Sec. 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, and amended by Sec. 201 of the Revenue Act of 1941, c. 412, 55 Stat. 687]. IMPOSITION OF TAX.

(a) *Imposition.*—

(1) *General rule.*—There shall be levied, collected, and paid, for each taxable year, on the adjusted excess profits net income, as defined in subsection (b), of every corporation (except a corporation exempt under section 727) the tax shown in the following table:

* * * * *

[Added by Sec. 222(b) of the Revenue Act of 1942, c. 619, 56 Stat. 798].

(5) *Deferment of payment in case of abnormality.*—If the adjusted excess profits net income (computed without reference to section 722) for the taxable year of a taxpayer which claims on its return, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, the benefits of section 722, is in excess of 50 per centum of its normal tax net income for such year, computed without the credit provided in section 26(e) (relating to adjusted excess profits net income), the amount of tax payable at the time prescribed for payment may be reduced by an amount equal to 33 per centum of the amount of the reduction in the tax so claimed. For the purposes of section 271, if the tax payable is the tax so reduced, the tax so reduced shall be considered the amount shown on the return.

(26 U.S.C. Sec. 710)

* * * * *

SEC. 713. EXCESS PROFITS CREDITS—BASED ON INCOME.

(a) *Amount of Excess Profits Credit.*—The excess profits credit for any taxable year, computed under this section, shall be—

(1) *Domestic Corporations.*—In the case of a domestic corporation—

(A) 95 per centum of the average base period net income,

(B) Plus 8 per centum of the net capital addition as defined in subsection (g), or

(C) Minus 6 per centum of the net capital reduction as defined in subsection (g).

(2) *Foreign Corporations.*—In the case of a foreign corporation, 95 per centum of the average base period net income.

(26 U.S.C. Sec. 713.)

* * * * *

SEC. 714. EXCESS PROFITS CREDIT—BASED ON INVESTED CAPITAL.

The excess profits credit, for any taxable year, computed under this section, shall be the amount shown in the following table:

If the invested capital for the taxable year, determined under section 715, is:	The credit shall be:
Not over $5,000,000	8% of the invested capital.
Over $5,000,000	$400,000 plus 7% of the excess over $5,000,000.

(26 U.S.C. Sec. 714.)

* * * * *

SEC. 722 [As added by Sec. 201 of the Second Revenue Act of 1940, *supra*, and amended by Sec. 222(a) of the Revenue Act of 1942, *supra*, and the Act of December 17, 1943, *supra*]. GENERAL RELIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

(a) *General Rule.*—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. In determining such constructive average base period net income, no regard shall be had to events or conditions affecting the taxpayer, the industry of which it is a member, or taxpayers generally occurring or existing after December 31, 1939, except that, in the cases described in the last sentence of section 722(b)(4) and in section 722(c), regard shall be had to the change in the character of the business under section 722(b)(4) or the nature of the taxpayer and the character of its business under section 722(c) to the extent necessary to establish the normal earnings to be used as the constructive average base period net income.

(b) *Taxpayers Using Average Earnings Method.*—The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713, if its average base period net income is an inadequate standard of normal earnings because—

(1) in one or more taxable years in the base period normal production, output, or operation was interrupted or diminished because of the occurrence, either immediately prior to, or during the base period, of events unusual and peculiar in the experience of such taxpayer,

(2) the business of the taxpayer was depressed in the base period because of temporary economic circumstances unusual in the case of such taxpayer or because of the fact that an industry of which such taxpayer was a member was depressed by reason of temporary economic events unusual in the case of such industry,

(3) the business of the taxpayer was depressed in the base period by reason of conditions generally prevailing in an industry of which the taxpayer was a member, subjecting such taxpayer to

(A) a profits cycle differing materially in length and amplitude from the general business cycle, or

(B) sporadic and intermittent periods of high production and profits, and such periods are inadequately represented in the base period,

(4) the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business. If the business of the taxpayer did not reach, by the end of the base period, the earning level which it would have reached if the taxpayer had commenced business or made the change in the character of the business two years before it did so, it shall be deemed to have commenced the business or made the change at such earlier time. For the purposes of this subparagraph, the term "change in the character of the business" includes a change in the operation or management of the business, a difference in the products or services fur-

nished, a difference in the capacity for production or operation, a difference in the ratio of nonborrowed capital to total capital, and the acquisition before January 1, 1940, of all or part of the assets of a competitor, with the result that the competition of such competitor was eliminated or diminished. Any change in the capacity for production or operation of the business consummated during any taxable year ending after December 31, 1939, as a result of a course of action to which the taxpayer was committed prior to January 1, 1940, or any acquisition before May 31, 1941, from a competitor engaged in the dissemination of information through the public press, or substantially all the assets of such competitor employed in such business with the result that competition between the taxpayer and the competitor existing before January 1, 1940, was eliminated, shall be deemed to be a change on December 31, 1939, in the character of the business, or

(5) of any other factor affecting the taxpayer's business which may reasonably be considered as resulting in an inadequate standard of normal earnings during the base period and the application of this section to the taxpayer would not be inconsistent with the principles underlying the provisions of this subsection, and with the conditions and limitations enumerated therein.

(c) *Invested Capital Corporations, Etc.*—The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer, not entitled to use the excess profits credit based on income pursuant to section 713, if the excess profits credit based on invested capital is an inadequate standard for determining excess profits, because—

(1) the business of the taxpayer is of a class in which intangible assets not includible in invested capital under section 718 make important contributions to income,

(2) the business of the taxpayer is of a class in which capital is not an important income-producing factor, or

(3) the invested capital of the taxpayer is abnormally low.

In such case for the purposes of this subchapter, such taxpayer shall be considered to be entitled to use the excess

profits credit based on income, using the constructive average base period net income determined under subsection (a). For the purposes of section 713(g) and section 743, the beginning of the taxpayer's first taxable year under this subchapter shall be considered to be that date after which capital additions and capital reductions were not taken into account for the purposes of this subsection.

(d) *Application for Relief Under This Section.*—The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710(a)(5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose of determining the tax under this subchapter for a subsequent taxable year.
(26 U.S.C. Sec. 722.)

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SEC. 728 [As added by Sec. 201 of the Second Revenue Act of 1940, *supra*]. MEANING OF TERMS USED.

The terms used in this subchapter shall have the same meaning as when used in Chapter 1.

(26 U.S.C. Sec. 728.)

SEC. 729 [As added by Sec. 201 of the Second Revenue Act of 1940, *supra*]. LAWS APPLICABLE.

(a) *General Rule.*—All provisions of law (including penalties) applicable in respect of the taxes imposed by Chapter 1, shall, insofar as not inconsistent with this subchapter, be applicable in respect of the tax imposed by this subchapter.

(26 U.S.C. Sec. 729.)

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CHAPTER 37—ABATEMENTS, CREDITS, AND REFUNDS

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SEC. 3771. INTEREST ON OVERPAYMENTS.

(a) *Rate.*—Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum.

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(g) [added by Sec. 2 (b) of the Act of December 17, 1943, *supra*] *Claims Based Upon Relief Under Section 722.*—If any part of an overpayment for a taxable year beginning prior to January 1, 1942, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year, no interest shall be allowed or paid with respect to such part of the overpayment. If any part of an overpayment for a taxable year beginning after December 31, 1941, is determined by the Commissioner to be attributable to the final determination of an application for relief or benefit under section 722 for any taxable year, no interest shall be allowed or paid with respect to such part of the overpayment for any period prior to one year after the filing of such application, or September 16, 1945, whichever is the later.
(26 U.S.C. Sec. 3771.)